CONTROLLED SEMI-PRESIDENTIALISM: THE CASE FOR SEMI-PRESIDENTIALISM UNDER THE INDIAN CONSTITUTION

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Prologue

In the 67 years since the people of India adopted, enacted, and gave to themselves their Constitution, a proposition of constitutional law in relation to the office of the President of the Indian Republic has come to be widely accepted. This accepted proposition, based on the authority of the judicial precedents of the Supreme Court of India, is that the Indian President is only a titular head of the executive branch and does not possess any actual executive powers.[1] Instead, it is the Council of Ministers (or the Union Cabinet), that

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[1] *See, e.g.*, V. Sudhish Pai, *Justiciablity of President's or Governor's assent*, (2012) 2 S.C.C. (JOURNAL) 1 at 4-5. Speaking in the context of giving assent to a bill passed by the Parliament, Pai observers, "As far as Union legislation is concerned, the matter does not present much difficulty or admit of any doubt. The President has to act on the aid and advice of the Council of Ministers and is bound by it [vide Article 74(1)]. Therefore his action in declaring his assent has to be on ministerial advice. ... Therefore the position of the President vis-à-vis Parliamentary legislation is clear. He cannot refuse or withhold consent. Doing so will be clearly unconstitutional both by the express language of Article 74 and the conventions developed in UK which conventions are as much part of our constitutional law as laid down by the Supreme Court and any such unconstitutional act would expose the President to impeachment."

exercises real executive power in India, thus making the office of the Prime Minister of India the place where the proverbial buck stops and not the office of the President of India.

This position can be traced back to a few Supreme Court opinions where certain articles of the Indian Constitution were interpreted by the Court to mean that the Indian Constitution does not envisage a US style Presidential system of governance. Rather the system envisaged by the Indian Constitution is the Westminster style Prime-Ministerial system of governance. The position of the Indian President was thus equated with that of the British Monarch, which is a titular head of state with the Prime Minister being the real person in the seat of executive authority. As a result, the office of the Indian President has been reduced to, what in India is sometimes referred to as, a "rubber-stamp" office, whereby the President is mostly a ceremonial head of state without any active participation in the inner workings of the executive or legislative business of the country.

The objective of this article is to subject this proposition of Indian constitutional law to close scrutiny. This article is divided into two parts. Part I of this article closely examines the Ceremonial Head position. It closely examines the text of the Indian Constitution and the Supreme Court opinions on the point that resulted in the view whereby the Indian President is only a ceremonial head of state who is totally bound by the advice the Union Cabinet and is not allowed to have any say in the executive branch of the government, the very branch of which the Indian Constitution declares him to be the head of. It also examines several other Supreme Court opinions that present a very different picture. A combined reading of these opinions along with the relevant constitutional text presents a picture that is very difficult to square with the Ceremonial Head position. Part II of this article attempts to square these contradictions by making the case for a semi presidential reading of the Indian Presidency. According to this reading, the Indian President is not a ceremonial head but has real, yet limited, powers. Called Controlled Semi-

Presidentialism, this view is supported by the constitutional text, Supreme Court opinions and evidence from the drafting era. The article concludes by summarizing the findings and reiterating the view that the even though the Indian President does not have any constitutional authority to govern the Indian Republic, a power that is and was always intended to be vested with the Council of Minister with the Prime Minister at its head, the Indian President has the power to refuse to follow the advice of his Council should following such advice result in a violation of the Presidential Oath of Office.

INTRODUCTION

The U.S. Constitution, which has been described as the prototype of pure Presidentialism[2], vests all executive power of the United Stated of America with the President of the United States of America.[3] The Indian Constitution, described by the Supreme Court of India as having adopted the British Westminster system of government,[4] declares that, "there shall be a President of India"[5] and vests all the executive power of the Union of India in the office of the President of India.[6] The Indian President is required to exercise the

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[2] Mark Freeman, Constitutional Frameworks and Fragile Democracies: Choosing between Parliamentarianism, Presidentialism and Semi Presidentialism, 12 PACE INT'L L. REV. 253, 262-63 (2000).

[3] U.S. CONST. Art. 2, § 1. (The executive Power shall be vested in a President of the United States of America...)

[4] *See, e.g.* Shamsher Singh v. State of Punjab, (1974) 2 S.C.C. 831 (India). Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring), "Our Constitution embodies generally the Parliamentary or Cabinet system of Government of the British del 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."

[5] INDIA CONST. Art. 52

powers of his office "either directly or through officers subordinate to him" and "in accordance with" the Indian Constitution.[7] Like his American counterpart, who is the Commander-in-Chief of the armed forces of the United States,[8] the Indian President is also the Supreme Commander of the armed forces of the Union of India.[9] However, the Parliament of India may regulate the supreme command vested in the Indian President through legislation.[10]

Whereas the American President is to be elected by a college of electors to be appointed by each State in "such manner as the legislature thereof may direct",[11] and this mode of election is widely understood to be direct election of

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[6] *Id.* Art. 53, § 1. (The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with the Constitution.)

[7] *Id.*

[8] U.S. CONST. Art. 2, § 2. (The President shall be Commander in Chief of the Army and Navy of the United States and of the Militia of the several States, when called into the actual service of the United States; ...)

[9] INDIAN CONST. Art. 53, § 2. (Without prejudice to the generality of the foregoing provisions, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.)

[10] *Id. See also* INDIA CONST. Art. 246, § 1 read with Schedule 7, List I (Union List), Entry 1, 2, 2A and 4. Art. 246, § 1 provides that the Parliament of India has the exclusive power to make legislation with respect to any of the matters listed in List I (Union List) in Schedule 7 of the Indian Constitution. Entry 1 of Schedule 7 says, "Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination of effective demobilisation", Entry 2 of Schedule 7 says, "Naval, military and air forces; any other armed forces of the Union", Entry 2A of Schedule 7 says, "Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment" and Entry 4 of Schedule 7 says, "Naval, military and air force works". There are several other entries in the Union List that are dealing directly or indirectly with either the armed forces of the Union of India or with prosecution of war or both.

[11] U.S. CONST. Art. II, § 1

the American President by the people of the United State,[12] the Indian President is elected indirectly by an electoral college consisting of the elected members of the both House of Indian Parliament and the elected members of the State Legislatures.[13] Whereas the American President is elected for a term of four years,[14] the Indian President is elected for a term of five years.[15]

The oath of office of the American and the Indian Presidents are almost identical to the extent that both Presidents swear an oath to faithfully discharge their office and to *preserve, protect and defend the Constitutions* of their respective republics. Whereas the American President takes the following oath:

> "I do solemnly swear (or affirm) that I will *faithfully execute the Office of President* of the United States, and will to be best of my Ability, ***preserve, protect and defend the Constitution of the United States,***"[16]

the Indian President takes the following oath:

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[12] *See, e.g. Election Process – Who elects the President*, LIBRARY OF CONGRESS, http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/elections/elecprocess.html (last visited July 2, 2015). This U.S. government publication, providing "Classroom Materials" for teachers, accurately describes the "Election Process" in the following words, "If you're an American citizen, 18 years of age or older, you probably think you have the right to vote for presidential candidates in the national election. You're wrong! In our country, when citizens punch their ballots for President, they actually vote for a slate of electors. Electors then cast the votes that decide who becomes President of the United States."

[13] INDIA CONST. Art. 54. (The President shall be elected by the members of an electoral college consisting of – (a) the elected members of both Houses of Parliament; and (b) the elected members of the Legislative Assemblies of the States.)

[14] U.S. CONST. Art. 2, § 1. (He (i.e. the President of the United States of American) shall hold Office during the Term of four Years ...)

[15] INDIA CONST. Art. 56. (The President shall hold office for a term of five years from the date on which he enters upon his office ...)

[16] U.S. CONST. Art. II, § 1, cl. 8. (Emphasis added)

> "I [name of the President], do swear in the name of God/solemnly affirm that I will *faithfully execute the office of the President* (or discharge the functions of the President) of India and will to the best of my ability ***preserve, protect and defend the Constitution*** and the law and that I will devote myself to the service and well-being of the people of India."[17]

The Presidential oath of office of the Indian President is important for the purpose of this article. While the Presidential oaths of office of the Indian and American Presidents are almost identical, the American President is not the only constitutional office holder in the United States that swears an oath to *preserve, protect and defend* the U.S. Constitution.[18] On the other hand, under the Indian Constitution, only two constitutional office holders swear an oath to *preserve, protect and defend* the Indian Constitution. The first is the Indian President and the second is the Governor of a State.[19] We may briefly compare the Presidential oath of the office of the Indian President with that of the Vice

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[17] INDIA CONST. Art. 60. (Emphasis added)

[18] The U.S. Constitution provides that all federal officials should "be bound of Oath of Affirmation", but the actual oath is not mentioned in the U.S. Constitution. *See* U. S. CONST. art. VI, § 3 (The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States). The oath taken be all federal employees, elected or appointed, other than the U.S. President, is mentioned in 5 U.S.C.§ 3331 and is as follows – "I [name], do solemnly swear of affirm that I will *support and defend the Constitution of the United States* against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, with any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."

[19] INDIA CONST. Art. 159. (The Gubernatorial oath of office is identically worded as the Presidential oath of office. It goes, "I [name of the Governor], swear in the name of God/solemnly affirm that I will faithfully execute the office of Governor (or discharge the functions of the Governor) of [name of the State] and will to the best of my ability *preserve, protect and defend the Constitution* and the law and that I will devote myself to the service and well-being of the people of [name of the State]." (Emphasis added)

President of India, who does not swear an oath to *preserve, protect and defend* the Indian Constitution but swears an oath:

> "I [name of the Vice President] do swear in the name of God/solemnly affirm that I will bear true faith, and allegiance to the Constitution of India as by law established and that I will faithfully discharge the duty upon which I am about to enter."[20]

However, while discharging his office, the Indian President is not allowed to act in the same manner as the American President. Whereas the executive powers vests absolutely in the American President for the four year term for which he is elected, the Indian President is required to execute his office with the "aid and advise" of his Council of Ministers.[21] The Indian President may require his Council of Ministers to reconsider their advice but if the same advice is tendered a second time the President cannot ask his Council to reconsider the said advice a third time.[22] Furthermore, the President is required to act in accordance with the advice so tendered.[23] The advice tendered to the President by his Council is beyond judicial review.[24] However, this was not always the case. While the original text of the Indian Constitution had the Presidential Aid & Advise Clause (whereby the President was to act on the aid and advise the Council), the clause requiring the President to mandatorily act on the aid and advise of the Council should such advice be re-

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[20] *Id.* Art. 69

[21] INDIAN CONST. Art. 74, § 1. (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.)

[22] *Id.* Art. 74, § 1, Proviso (Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.)

[23] *Id.*

[24] *Id.* Art. 74, § 2. (The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.)

tendered a second time was absent. This clause was inserted by the 44th Amendment in 1978.

The Presidential Aid & Advise Clause of the Indian Constitution raises a significant question. What system of government did the framers of the Indian Constitution envisage when they drafted the Indian Constitution? Did they envisage a United States style Presidential form of government where the proverbial buck stops with the President? Or did they envisage a British Westminster style of government where the Prime Minister and his cabinet effectively exercise the executive power with the Monarch being only a constitutional head of State? Or, and more importantly, did they envisage something different? Perhaps a semi-presidential system of government where ordinarily the Prime Minister and his cabinet effectively exercise the executive power and govern the country with the President exercising a supervisory function to ensure that his Council of Ministers, headed by the Prime Minister, does not act in derogation of the Constitution and the laws, as the Presidential oath of office indicates? This question becomes even more important when we examine the oath of office taken by Members of Parliaments and the Ministers in India. A Member of Parliament in India swears the following oath:

> "I, [name of the Member of Parliament], having been elected (or nominated) a member of Council of States (or the House of the People) do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India and that I will faithfully discharge the duty upon which I am about to enter."[25]

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[25] *Id.* Third Schedule (Forms of oaths or affirmations), Section III, Part B (Form of oath or affirmation to be made by a member of Parliament)

Only a Member of Parliament can be appointed as a Minister in the Council of Ministers as envisaged in the Presidential Aid & Advise Clause.[26] Upon being appointed a Minister in the Council (including the Prime Minister), the Member of Parliament has to swear an additional oath of office, and an oath of secrecy, which are as follows:

> "I, [name of the Minister], do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will faithfully and conscientiously discharge my duties as a Minister for the Union and that I will do right to all manner of people in accordance with the Constitution and the law, without fear or favour, affection or ill-will."[27]
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> "I [name of the Minister] do swear in the name of God/solemnly swear that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Minister for the Union except as may be required for the due discharge of my duties as such Minister."[28]

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[26] Though there is no requirement for a person to be a member of the Parliament at the time of such person's appointment as a Minister, such person must get him or herself elected to the Parliament within six months of such appointment. *See* INDIA CONST. art. 75, § 5. ("A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.")

[27] INDIA CONST. Third Schedule (Forms of oaths or affirmations), Section I (Form of oath of office for a Minister for the Union)

[28] *Id.* Third Schedule (Forms of oaths or affirmations), Section II (Form of oath of secrecy for a Minister for the Union)

Even the judges of the Supreme Court of India or the High Court of a State, who have the power of judicial review to invalidate Parliamentary and State legislations,[29] do not swear an oath to *preserve, protect and defend the Constitution*. The oath of office of a judge of the Supreme Court of India and that of a judge of the High Court of a State, almost identically worded, are as follows:

> "I [name of the judge] having being appointed Chief Justice (or a Judge) or the Supreme Court ... do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of India as by law established, that I will uphold the sovereignty and integrity of India, that I will duly and faithfully and to the best of my ability, knowledge and judgment perform the duties of my office without fear or favour, affection or ill-will and that I will uphold the Constitution and the law."[30]

Therefore we see that a Member of Parliament, a Minister of the Council (whose aid and advice to the President has become binding after the 44th Amendment in 1978 if tendered a second time), a judge of the Supreme Court and that of a High Court, all swear an oath to uphold and work within the Constitution and the laws. Only the President swears an oath to *preserve, protect and defend the Constitution*. Under these circumstances a question naturally arises. What would happen in a situation where the President comes to the conclusion that if he were to act on the aid and advice tendered by his Council, as he is constitutionally required to do (as per the Proviso in the Presidential Aid & Advise Clause inserted by the 44th Amendment in 1978), he

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[29] *Id.* Art. 32 and Art. 226

[30] *Id.* Third Schedule (Forms of oaths or affirmations), Section IV (Form of oath or affirmation to be made by the Judges of the Supreme Court and the Comptroller and Auditor-General of India). Section VIII lays down the oath of a Judge of the High Court and is identically worded.

would be acting in violation the Presidential oath that he swore upon assuming his office? In other words, what happens if he discharges his office in accordance with the Presidential Aid and Advise Clause and as a result violates his oath of office? If he is to stay true to his oath of office, must he refuse to act in accordance with the Presidential Aid and Advise Clause? A situation like this could potentially cause a constitutional crisis.

In addition to a potential constitutional crisis, these questions also give rise to a wider question. How are we to categorize the system of government as envisaged by the Indian Constitution? Is it pure Presidentialism similar in style and function to the U.S. Constitution? Is it pure Westminster style Parliamentarianism similar in style and function to the British system? Is it pure Semi-Presidentialism similar to the French Constitution? Or does the Indian Constitution envisage a new, different model of Semi-Presidentialism that does not fit into any of the pre-existing categories?[31] It is to the investigation of these questions that we will dedicate the rest of this article.

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[31] *See, e.g.* M. M. Ismail, *The President and the Governors in the Indian Constitution*, (1971) 84 LAW WEEKLY (JOURNAL SECTION) 7 at 8. Justice Ismail notes that, "The entire scheme of the Indian Constitution makes it clear that the framers of the Constitution preferred the Cabinet system of Government to that of a Presidential type prevalent in the United State. **But none-the-less both the types belong to the same genus of democratic system.**" Later, Justice Ismail goes on to show how the Indian system cannot be compared with the British system. Several others scholars have made this point and have been cited, quoted from and discussed later in this article. All this authority clearly shows that before putting the Indian system in the British Westminster system category, a careful review of historical sources, drafting history and subsequent jurisprudence is required. This task has been undertaken in this article (emphasis added).

PART – 1 – IS THE INDIAN PRESIDENT JUST A "CEREMONIAL" HEAD OF THE INDIAN STATE?

A. The "Ceremonial Head" Position

It is generally believed that the Indian Presidency is mostly a ceremonial position.[32] However, an examination of the relevant provisions of the Indian Constitution shows that this is really not the case. The Indian Constitution says nowhere that the Indian Presidency is a ceremonial or a figurehead presidency. That the Indian Presidency is a ceremonial or a figurehead presidency is not the result of a direct reading of the text of the Indian Constitution but the interpretation given by a decision of the Supreme Court of India in the famous *Samsher Singh* case.[33]

Shamsher Singh was decided by a seven judge bench of the Supreme Court in which two concurring opinions were delivered.[34] Interestingly, the issue in this case, as it arose on the facts of the case, was not regarding the nature of the office of the Indian President.[35] The issue was regarding the extent of the personal discretion that the Governor of a State can exercise with regards to appointment and dismissal of a judicial officer in the State.[36] The petitioners in

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[32] *See, e.g.* M. M. Ismail, *supra* note 31 at 7 ("It has been assumed by many and actually given expression to by several, that under the Constitution of India, the President and the Governors occupy a position which the Sovereign in England occupies and as such are bound to accept the advice of their Council of Ministers and act only in accordance with that advice in all matters. I am of the opinion that such an assumption is not justified or warranted, from more than one point of view."); Pai, *supra* note 1.

[33] Shamsher Singh v. State of Punjab, (1974) 2 S.C.C. 831 (India) (hereinafter "Shamsher Singh").

[34] The lead opinion was delivered by Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) and a separate concurring opinion was delivered by Justice Krishna Iyer (for himself, Justice Bhagwati concurring)

[35] 2 H. M. SEERVAI, 2 CONSTITUTIONAL LAW OF INDIA at 2035, ¶ 18.23 (1993) (hereinafter "SEERVAI, VOL. 2").

[36] Shamsher Singh, *supra* note 33, at 835-838. Two officers of the Punjab Civil Service (Judicial Branch) were appointed on probation. The services of these officers were

this case were two judicial officers serving on probation in Punjab who had had their services terminated. Challenging the termination of their services as unconstitutional, they argued that their services could only be terminated by the Governor exercising his discretion in a personal capacity.[37] The petitioners restricted their attack by focusing attention only on the nature of the Governor's office.[38] The State, resisting the constitutional challenge, argued that the position of the Governor and that of the President under the Indian Constitution is similar and like the President, the Governor can only exercise his executive functions only with the aid and advice of the State Cabinet.[39] The question of law formulated by Chief Justice Ray (speaking for himself and four other justices) was stated as: "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."[40] Now, the opinion is open to criticism on the

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terminated under the Punjab Civil Service (Judicial Branch) Rules, 1951. The officers challenged their termination on the ground that their services could only be terminated by the Governor exercising his personal discretion. In other words, in the matter of their termination, the Governor was not bound by the aid and advice of the State Cabinet or the recommendation of the High Court of Punjab and Haryana.

[37] *Id.* at 836. Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) recorded the submission of the petitioner's counsel, "The appellants contend 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 Services only personally."

[38] *Id.* at 836-37. Primarily two arguments were raised *viz.* (1) the powers that have been conferred on the Governor *eo nomine* are to be exercised by the Governor on his personal discretion; (2) the Gubernatorial Aid & Advice Clause is a restriction only on the exercise of executive powers of the State, however, the function of appointing and removing subordinate judicial officers is not such a function to which the said clause could apply.

[39] *Id.* at 837. Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) recorded the submission of the State, "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 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."

[40] *Id.* at 838.

ground that an examination of the nature of the office of the Indian President neither arose nor was before the Court in *Shamsher Singh*. The only question was regarding the scope of the office of the Governor. Therefore whatever has been stated by the Court about the constitutional position on the Indian President is not binding. However, the purpose of this article is not to engage in an in-depth critique of *Shamsher Singh* on the question of the binding nature of its key holding, thus whatever the Court said on the nature of the Indian Presidency is assumed to be in the nature of binding precedent.

Speaking for the majority, the Chief Justice held that the Indian Constitution puts in place a system of governance that is based on the British Parliamentary model, and the Indian President therefore is only a "formal head of the Union."[41] The Chief Justice then compared the Indian system with its British counterpart and held that both systems are similar.[42] On this basis it was further held that powers of the Indian President are similar to the powers of the Crown under the British Parliamentary system.[43] In this way the Indian

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[41] *Id.* at 840. Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) held, "Our Constitution embodies generally the Parliamentary or Cabinet system of Governance 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." *See also* SEERVAI, VOL. 2, *supra* note 35 at 2035, ¶ 18.23

[42] *Id.* at 841. Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) held, "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." (Emphasis added)

[43] *Id.* at 841. Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) held, "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.**" (Emphasis added). *See also* SEERVAI, VOL. 2, *supra* note 35 at 2036.

Presidency was declared by the Supreme Court to be a ceremonial or a figurehead presidency whereas the "real executive power" was declared to be vested with the Council of Ministers (or the Cabinet).[44]

B. Why the "Ceremonial Head" Position is questionable

One of the reasons why *Shamsher Singh* held that the Indian Presidency was a ceremonial or a figurehead presidency was that the Indian Constitution did not textually require the President to exercise the executive power by exercising his personal discretion.[45] This point was highlighted by the fact that in the case of the Governor the text of the Indian Constitution specifically requires the Governor's personal discretion in certain cases, whereas no such textual equivalent could be found in the case of the President.[46] However, this logic is not entirely accurate.

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[44] *Id.* at 842, Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) held, "**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 in the exercise of his functions", and further at 849, "... [W]e 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.**" (Emphasis added)

[45] *Id.* at 847, Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) held, "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 constitution 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 exercises all his powers and functions."

[46] *Id.*

The Governor of a State, under the Indian Constitution, is not an elected head of the State. The Governor is appointed by the President[47] (on the aid and advice of his Council) and serves at the pleasure of the President.[48] On the other hand, the Indian President is an elected high constitutional functionary with security of tenure.[49] The Governor being a non-elected head of the State with no guarantee of tenure, it is not only desirable but also necessary to specifically provide in the Constitution exactly where the Governor is bound by his Council of Ministers and where he is allowed to act in his personal discretion. On the other hand, the President being the head of the Indian Union and being an elected constitutional office holder with security of tenure, it is not necessary to specifically provide in the President's case what must be provided in the Governor's case.

Furthermore, the alleged equivalence of the Indian President and the British Monarch is questionable. It is correct to say that the Indian Constitution puts in place a British Parliamentary style of government with the principle of Council of Ministers being responsible to the Parliament or the State Legislature, as the case may be. However, insisting on the basis of this similarity alone that the Indian President and the British Monarch occupy similar constitutional positions, and thus must discharge similar constitutional functions, is incorrect.[50] As a matter of fact, even in the very first case where

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[47] INDIA CONST. art. 155 ("The Governor of a State shall be appointed by the President by warrant under his hand and seal.")

[48] *Id.* art. 156, § 1 ("The Governor shall hold office during the pleasure of the President.")

[49] *Id.* art. 56, § 1 ("The President shall hold office for a term of five years from the date on which he enters upon his office: Provided that - (a) the President may, by writing under his hand addressed to the Vice-President, resign his office; (b) the President may, for violation of the Constitution, be removed from office by impeachment in the manner provided in article 61 ...")

[50] Ismail, *supra* note 31 at 8, Justice M. M. Ismail is not the first person to make this point, however, he made the point very forcefully in "Justice Sundaram Chettiar Memorial Lecture" delivered on January 23rd, 1971. Justice Ismail's lecture, which was later published, remains the most authoritative treatment of the subject on the point. He notes, "The fact that the framers of the Indian Constitution have preferred to adopt

questions of constitutional interpretation were raised before the Supreme Court of India, one of the concurring opinions expressed a view that the Indian Constitution cannot be categorized as similar to the British system in the matter of parliamentary supremacy.[51] Justice Krishna Iyer's use of the Constituent Assembly Debates in *Shamsher Singh* to interpret the Presidential Aid & Advice clause in order to declare that the Indian system is similar to the British system has also been questioned, which raises further doubts on the correctness of the view taken in the concurring opinion.[52] Apart from this, there are at least six key Supreme Court opinions that are very difficult to

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the Cabinet system does not and need not necessarily mean that all the conventions available in the British Constitution system have been incorporated wholesale into the Constitution of India. Whether any and if so, what conventions have been imported into the text of the Indian Constitution have to be ascertained only from the language of the Constitution itself."; SEERVAI, VOL. 2, *supra* note 35 at 2046, Seervai argues that the position of the Indian President and the English Monarch are not comparable because the character of both these offices in their respective systems is entirely different. Seervai says, "The position of the President of India is very different ... he belongs to a political party, his election is supported by the party in power, or by a group of parties, and he might be elected after a bitter electoral contest. It is unlikely that a politician elected with the support of political parties can stand outside the political arena."

[51] A. K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27. Justice Mukherjea (for himself) observing that, "The Constitution of India is a written Constitution and thought it has adopted many of the principles of the English parliamentary system, it has not accepted the English doctrine of the absolute supremacy of the Parliament in matters of legislation. In this respect, it has followed the American Constitution and other systems modelled on it. Notwithstanding the representative character of their political institutions, the Americans regard the limitations imposed by their Constitution upon the action of the Government, both legislative and executive, as essential to the preservation of public and private rights."

[52] SEERVAI, VOL. 2, *supra* note 35 at 2042. ("If the debates in the Constituent Assembly were permissible aids to interpreting the provisions of our Constitution, it could be plausibly argued that by dropping the Instrument of Instructions, and consequently Clause 3, the Constituent Assembly indicated its intention that the President was not to be bound by the advice of his Ministers. At any rate, the question whether the President was bound to follow the advice of his Ministers was left in a state of doubt and uncertainty since the only provision which was said to resolve that doubt was omitted. It is submitted that the thesis of the concurring judgment is *not* "strengthened" by the Constituent Assembly Debates, but if anything, is weakened by reference to them.") (Emphasis supplied)

square with the *Shamsher Singh* view. Let us examine those opinions a little closely now.

Dr. D. C. Wadhwa v. State of Bihar

Dr. D. C. Wadhwa,[53] decided in 1987 by an unanimous five judge constitutional bench of the Supreme Court of India, is the first case that this author's research found to be calling into question the breadth of *Shamsher Singh*'s holding and the "Ceremonial Head" view regarding the Indian Presidency.

In this case the massive re-promulgation of ordinances by the Governor of Bihar[54] was challenged on the ground that such a "routine promulgation"[55] was unconstitutional. The question before the Court therefore was whether such re-promulgations could be "justified as representing legitimate exercise of power of promulgating ordinances".[56] We might note here that the power to promulgate ordinances is vested in both the Governor of a State[57] and also the

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[53] Dr. D. C. Wadhwa v. State of Bihar, (1987) 1 S.C.C. 378 (India) (hereinafter "Dr. D. C. Wadhwa").

[54] Dr. D. C. Wadhwa, *supra* note 46 at 384-389. The Court found, at 384-85, that, "... the Government of Bihar promulgated 256 ordinances between 1967 and 1981 and all these ordinances were kept alive for periods ranging between one to 14 years by repromulgation from time to time."

[55] *Id.* at 388. Chief Justice Bhagwati (for the Court), "It will thus be seen that the power to promulgate ordinances was used by the Government of Bihar on a large scale and after the session of the State legislature was prorogued, the same ordinances which had ceased to operate were repromulgated containing substantially the same provisions almost in a routine manner."

[56] *Id.* at 391. Chief Justice Bhagwati (for the Court), "The question is whether this practice followed by the Government of Bihar could be justified as representing legitimate exercise of power of promulgating ordinances conferred on the Governor under Article 213 of the Constitution."

[57] INDIA CONST. art. 213, § 1 ("If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as circumstances appear to him to require...")

President of India.[58] The constitutional provisions granting these powers to the Governor and the President are textually identical.[59]

The Court held that the power to promulgate ordinances is in the nature of an emergency power and has been granted to the Governor only to be exercised when the "[state] legislature in not in session".[60] Since the power is granted to "meet an extraordinary situation", it cannot be misused for political purposes.[61] The Court found such re-promulgation of Ordinances to be a "colorable exercise of the power"[62] and accordingly ruled the re-promulgations to be unconstitutional.[63] One of the reasons given by the Court in arriving its

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[58] *Id.* art. 123, § 1. ("If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.")

[59] Compare the text in *supra* note 57 with note 58. *See also,* Dr. D. C. Wadhwa, *supra* note 53 at 394. Chief Justice Bhagwati (for the Court), "It is significant to note that so far as the President of India is concerned *though he has the power of issuing an ordinance under Article 123 as the Governor has under Article 213,* there is not a single instance in which the President has, since 1950 till today, repromulgated any ordinance after its expiry."

[60] Dr. D. C. Wadhwa, *supra* note 53, at 392. Chief Justice Bhagwati (for the Court), "The power conferred on the Governor to issue ordinances *is in the nature of emergency power* which is vested in the Governor for taking immediate action where such action may become necessary the time when the *legislature is not in session.*" (Emphasis added)

[61] *Id.* Chief Justice Bhagwati (for the Court), "The power to promulgate an ordinance is essentially a power to be used *to meet an extraordinary situation* and it cannot be allowed to be "perverted to serve political ends.'"

[62] *Id.* at 394. Chief Justice Bhagwati (for the Court), "When the constitutional provision stipulates that an ordinance promulgated by the Governor to meet an emergent situation shall cease to be in operation at the expiration of six weeks from the reassembly of the legislature and the government if it wishes the provisions of the ordinance to be continued in force beyond the period of six weeks has to go before the legislature which is the constitutional authority entrusted with the law-making function, it would most certainly by a *colorable exercise of power for the government to ignore the legislature and to repromulgate the ordinance and thus to continue to regulate the life and liberty of the citizen through ordinance made by the executive.*" (Emphasis added)

[63] *Id.* at 395. Chief Justice Bhagwati (for the Court), "The startling facts which we have narrated above clearly show that the executive in Bihar has almost taken over the role

ruling was that a re-promulgation of Ordinances by the executive would result in shutting out the legislature completely and that would amount to "subverting the democratic process" that lay "at the core of" the Indian Constitution.[64] In the second part of this article we will see how several of the founding fathers had expressed similar concerns about the grant of the power to promulgate ordinances.[65] In fact, currently the Supreme Court of India is hearing a case that deals with the question of the constitutional validity of re-promulgation of Ordinances by the President.[66] In *D. C. Wadhwa* the Court had expressed its concerns over the practice of re-promulgation and had expressed a "hope and trust" that such practices will "not be continued in future."[67] As a matter of fact, the Court compared the practice of re-

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of legislature in making laws, not for a limited period, but for years altogether in disregard of the constitutional limitations. *This is clearly contrary to the constitutional scheme and it must be held to be improper and invalid.*" (Emphasis added)

[64] *Id.* at 393. Chief Justice Bhagwati (for the Court), "The executive cannot by taking resort to an emergency power exercisable by it only when the legislature is not in session, take over the law-making function of the legislature. That would clearly be subverting the democratic process which lies at the core of our constitutional scheme, for then the people would be governed not by laws made by the legislature as provided in the Constitution but by laws made by the executive. The government cannot by-pass the legislature and without enacting the provisions of the ordinance into an Act of the legislature, repromulgate the ordinance as soon as the legislature is prorogued."

[65] *Infra* at 30, Part II-A - Evidence from the Constituent Assembly Debates - Debates from the provisions concerning Presidential power to promulgate Ordinances when Parliament is not in session. *See also eg.* Dr. D. C. Wadhwa, *supra* note 53 at 394 (and compare). Chief Justice Bhagwati (for the Court), "Such a stratagem would be repugnant to the constitutional scheme, as it would enable the executive to transgress its constitutional scheme in the matter of law-making in an emergent situation and to covertly and indirectly arrogate to itself the law-making function of the legislature."

[66] *See* Krishnadas Rajgopal, *Was re-promulgation of land ordinance valid, SC asks Centre*, THE HINDU (April 14, 2015), http://www.thehindu.com/news/national/sc-agrees-to-examine-repromulgation-of-land-ordinance/article7098613.ece (last visited June 22, 2015); Joji Thomas Philip, *Decoding India's ordinance system*, LIVE MINT (January 10, 2014), http://www.livemint.com/Specials/ZRtVJMBfOLoQ4l9ZoMA2wK/Decoding-Indias-ordinance-system--Shubhankar-Dam.html (last visited June 22, 2015)

[67] Dr. D. C. Wadhwa, *supra* note 53 at 395. Chief Justice Bhagwati (for the Court), "We hope and trust that such practices shall not be continued in the future and that whenever an ordinance is made and the government wishes to continue the provisions of the ordinance in force after the assembling of the legislature, a Bill will be brought

promulgation of Ordinances by the Governor of Bihar with contemporary practice of the same power with the President and found that in the President's case, "... there is not a single instance in which the President has, since 1950 till today, re-promulgated any ordinance after its expiry."[68]

Let us undertake a little thought experiment at this point and ask ourselves the question - what is the Indian President supposed to when confronted with the following choice? The President has been advised by his Council to re-promulgate an Ordinance that he knows is in violation of *D. C. Wadhwa*. Should the President stay true to the view taken by the Supreme Court in *Shamsher Singh*, re-promulgate the Ordinance, allow the commission of an act that he knows to be unconstitutional, and wait for the Supreme Court to eventually judge the validity of such act, assuming it is challenged in the Court? Or should the President stay true to his Oath of Office and refuse to allow the commission of an act that he knows is clearly unconstitutional? There could exist a serious and genuine disagreement on this point. The mere existence of a genuine doubt as to what should the Indian President do in such a situation means that the view taken in *Shamsher Singh* is not so universally applicable as it said to be and needs to be revisited and re-examined.

In this author's opinion it would be incorrect to insist that the President should consider himself bound by the advice of his Council in a situation where it is clear to the President that the Council has advised him to authorize the commission of act that is unconstitutional.[69] No self-respecting President

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before the legislature for enacting those provisions into an Act. There must not Ordinance-Raj I the country."

[68] *Id.* at 394-95.

[69] Though, it should be noted here that the Presidential Oath of Office under the Indian Constitution has been invoked before to make a similar point. Justice Ismail, in elaborate treatment of the subject also invokes the Presidential and the Gubernatorial oaths of office to make a similar point, though the ambit of constitutional authority that he would like to ascribe to the Indian President are wider than what I would suggest in Part II of this article. *See* Ismail, *surpa* note 31 at 12. ("The President and the

would, and should, knowingly permit the commission of unconstitutional acts.[70] But if that is the case, then it must be conceded that the view taken by the Supreme Court in *Shamsher Singh* is not universally applicable. It only lays down the general position that is subject to the exception that in the event the President finds that he has been advised to authorize the commission of an unconstitutional act, the President has the constitutional authority to refuse to act on the advice tendered by his Council.

S. R. Bommai v. Union of India

The Indian President being absolutely bound by the aid and advice of his Council in the discharge of the executive functions, as held in *Shamsher Singh*, also becomes a highly contestable position in the light of an opinion delivered by a nine judge constitutional bench of the Supreme Court in *Bommai*.[71] *Bommai* had raised several constitutional questions of considerable importance. One of those questions was whether the satisfaction of the Indian President needed to proclaim a state of emergency under article 356 could be judicially reviewed. Under article 356, if the President is satisfied that a situation has arisen in which the government of a State cannot be carried on in accordance with the Constitution, he can suspend the State Legislature, assume to himself all the functions of the State Government, and vest all the functions of the State Legislature in the Parliament until normalcy is restored

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Governors take their oath to preserve, protect and defend the Constitution and to devote themselves to the service and the well being of the people of India ... therefore the reasons which compel the President and the Governors to disagree with the advice tendered by the Council of Ministers must be correlated to this obligation which has been imposed on them by their oath of office.")

[70] *See* Ismail, *supra* note 31 at 12. ("... when the President and the Governors consider that a particular advice tendered by the Council of Ministers will not enable him or them to preserve, protect and defend the Constitution and the law ... the President and the Governors are bound to reject such advice.")

[71] S. R. Bommai v. Union of India, (1994) 3 S.C.C. 1 (India) (hereinafter "Bommai").

in the State.[72] This drastic power is however regulated by constitutionally mandated, very strict Parliamentary oversight.[73] The Court, by majority, held that meanwhile the Court could not go into the content of the advice tendered to the President by his council (under the Presidential Aid & Advice Clause), the Court could still examine the materials on the basis of which the advice was tendered to the President.[74]

We may engage in the same thought experiment once again. Assume that a particular Council of Ministers advises the President to proclaim a state of emergency under article 356. The President knows that the advice tendered by his Council is in clear violation of the law laid down by the Supreme Court in *Bommai*. Should the President stay true to the law as laid down in *Shamsher Singh* and issue the proclamation of emergency as advised by his Council? Or

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[72] INDIA CONST. art. 356, § 1. (If the President, on receipt of report from the Governor of the State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation – (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or any body or authority in the State other than the Legislature of the State; (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament; (c) make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State provided that nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court, or to suspend in whole or in part the operation of any provision of this Constitution relating to High Courts.)

[73] *Id.* art. 356, §§ 2-5

[74] Bommai, *supra* note 71 at 148. Justice Sawant (for himself and Justice Kuldeep singh, Majority Opinion), holding that, "The validity of the Proclamation issued by the President under Article 356(1) is judicially reviewable to the extent of examining whether it was issued on the basis of any material at all or whether material was relevant or whether the Proclamation was issued in mala fide exercise of the power. ... Article 74(2) is not a bar against the scrutiny of the material on the basis of which the President had arrived at his satisfaction." Justice Reddy who wrote an opinion for himself and Justice Agarwal and Justice Pandian who wrote a short opinion for himself agreed with these conclusions thus making Justice Sawant's opinion the majority opinion.

should the President stay true to the law as laid down in *Bommai* and refuse to issue the proclamation of emergency on the ground that what his Council has advised him is clearly unconstitutional and thus in violation of the oath of his office?

Some would suggest that the President should stay true to *Shamsher Singh* and let the Supreme Court be the judge of the constitutional validity of the proclamation of emergency. That would be a disastrous suggestion. Not only would such a view militate against the Presidential oath of office, such a view would actually encourage the President to willfully and intentionally allow the commission of an act that he knows to be unconstitutional. Such an act on the President's part would be grounds for impeachment. In *Shamsher Singh* the Court observed that while making a report to the President on the state of breakdown of constitutional machinery in the State, the Governor is permitted to act in his personal discretion and even contrary to the advice of his Council.[75] The suggestion that the President should follow *Shamsher Singh* and do as advised becomes even more absurd in light of this observation, especially when read with *Bommai*'s key holdings on the point. To take our thought experiment a little further, imagine a situation where on the one hand the President is holding the Governor's report that tells him that there is no situation that could be described as a breakdown of constitutional machinery in the State, and in the other hand he holds the advice of his council to declare a state of emergency under article 356 without stating any clear, or even questionable, grounds. What is the President to do in such a case? A President true to the oath of his office would never sanction the commission of an act

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[75] Shamsher Singh, *supra* note 33, Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) observed, "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 enable him to report to the President who, however, must act on the advice of his Council of Ministers in all matters."

that he knows to be unconstitutional.[76] Situations like this demand that the President be given the constitutional authority to exercise his personal discretion and decide for himself whether he is sanctioning an act that is unconstitutional. In our particular thought experiment, the President would be determining the constitutional validity of the act that he is about to sanction by applying to the facts the law laid down by the Supreme Court in *Bommai*.

M. P. Special Police Establishment v. State of M.P.

This thought experiment could also be played out by keeping in mind the law laid down by a unanimous five judge constitution bench of the Supreme Court in *M. P. Special Police Establishment*[77] case. In this case a criminal complaint was filed against two Cabinet Ministers who were ministers in the Madhya Pradesh government. After investigations by an independent body it was concluded that "there were sufficient grounds for prosecuting the two Ministers" under the relevant provisions of the Prevention of Corruption Act, 1988.[78] Based on this report, a sanction to prosecute the two Ministers was sought from the Madhya Pradesh cabinet, but was denied.[79] The Governor of

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[76] *See* Ismail, *supra* note 31 at 12

[77] M. P. Special Police Establishment v. State of M.P., (2004) 8 S.C.C. 788 (India) (hereinafter "M.P. Special Police Establishment")

[78] M.P. Special Police Establishment, *supra* note 77 at 794. Justice Variava (for the Court), noted the facts - "A complaint was made to the Lokayukta against [the two Ministers] for having released 7.5 acres of land illegally to its earlier owners even though the same had been acquired by Indore Development Authority. After investigation the Lokayukta submitted a report holding that there were sufficient grounds for prosecuting the two Ministers under Section 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988".

[79] *Id.* at 795. Justice Variava (for the Court), noted the facts - "Sanction was applied for from the Council of Ministers for prosecuting the two Ministers. The Council of Ministers held that there was not an iota of material available against both the Ministers from which it could be inferred that they had entered into a criminal conspiracy with anyone. The Council of Ministers thus refused sanction on the ground that no prima facie case had been made out against them."

the State, however, refused to deny the grant of sanction and proceeded to grant the same on the ground that "available documents and the evidence were enough to show that a prima facie case for prosecution had been made out."[80] Against this, the two Ministers approached the Madhya Pradesh High Court and sought a writ quashing the Governor's order, which was accepted by a single judge bench of the High Court, and then affirmed in appeal by a Division Bench of two judges of the same court.[81] The case was then taken to the Supreme Court where a five judge bench was assembled to answer the question – "... whether a Governor can act in his discretion and against the aid and advice of the Council of Ministers in a matter of grant of sanction for prosecution of Ministers for offences under the Prevention of Corruption Act and/or the Indian Penal Code."[82] Answering this question in the favor of the Governor (and thus overturning the High Court on the point), the unanimous Court held as following:

> "... **[t]he normal rule is that the Governor acts on the aid and advice of the Council of Ministers and not independently or contrary to it.** But there are exceptions under which the Governor can act in his own discretion. ... [t]he concept of the Governor acting in his discretion or exercising independent judgment is not alien to the

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[80] *Id.* at 795, Justice Variava (for the Court), noted the facts – "The Governor then considered grant of sanction keeping in view the decision of the Council of Ministers. The Governor opined that the available documents and the evidence were enough to show that a prima facie case for prosecution had been made out. The Governor accordingly granted sanction for prosecution under Section 197 of the Criminal Procedure Code."

[81] *Id.* at 795. The Single Judge held that "granting sanction for prosecuting the Ministers was not a function which could be exercised by the Governor "in his discretion" within the meaning of these word as used in Article 163 of the Constitution". Thus the Governor "could not act contrary to the "aid and advice" of his Council of Ministers." The Division Bench, in appeal, affirmed the "reasoning and judgment" of the Single Judge.

[82] *Id.* at 795

> Constitution. It is recognized that **there may be situations where by reason of peril to democracy or democratic principles, an action may be compelled which from its nature is not amenable to Ministerial advice.** Such a situation may be where bias in inherent and/or manifest in the advice of the Council of Ministers."[83]

At this point it is necessary to quickly refer to the Gubernatorial Oath of Office, discussed in a previous part of this article:

> "I [name of the Governor], swear in the name of God/solemnly affirm that I will faithfully execute the office of Governor (or discharge the functions of the Governor) of [name of the State] and will to the best of my ability *preserve, protect and defend the Constitution* and the law and that I will devote myself to the service and well-being of the people of [name of the State]."[84]

It has been noted before that the President and the Governor are the only two high constitutional offices under the Indian Constitution whose Oath of Office is to "preserve, protect and defend the Constitution." We have also noted that Governor is not an elected head of State, but is appointed by the President and serves at the pleasure of the President. What if the President of India ever finds himself in a position in which the Governor found himself in *M. P. Special Police Establishment*? Should the President follow *Shamsher Singh* and put "democracy at peril"? Or should he stay true to his Oath of Office and refuse to act in accordance with the advice tendered by his Council? This would be a situation where the President would not be bound by *Shamsher Singh* and would be well within his constitutional authority to

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[83] *Id.* at 798. Justice Variava (for the Court) (Emphasis added)

[84] INDIA CONST. Art. 159. (Emphasis added)

refuse to act on the advice of his Council that he knows is in violation of the rationale behind the holding of the unanimous Court in *M.P. Special Police Establishment*.[85] In this situation, the President would also be determining the constitutional validity of the act he is about to sanction on the parameters of constitutional values that the Indian Constitution was written to uphold. It would be most incongruous to insist that the Indian Constitution would simultaneously vest in the Indian President the executive power of the Union of India[86] but prohibit the President to independently ascertain the constitutional validity of the actions that are to be done in his name.[87]

Union of India v. Jyoti Prakash Mitter

The weight and authority of *Shamsher Singh*'s declaration that the Indian President is only a figurehead President without any real constitutional authority is also called into question by a little known opinion delivered by a unanimous constitution bench of six judges in *Mitter*.[88] The question of constitutional law in this case was concerning article 217 that provides for "appointment and conditions of the office of a Judge of the High Court."[89] The dispute was regarding the age of a judge of the High Court that, as per article 217(3), is to be determined "by the President after consultation with the Chief

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[85] *See* Ismail, *supra* note 31 at 12. ("... when the President and the Governors consider that a particular advice tendered by the Council of Ministers will not enable him or them to preserve, protect and defend the Constitution and the law ... the President and the Governors are bound to reject such advice.")

[86] INDIA CONST. art. 53, § 1. ("The executive power of the Union shall be vested in the President ...")

[87] *Id.* art. 77, § 1. ("All executive action of the Government of India shall be expressed to be taken in the name of the President.")

[88] Union of India v. Jyoti Prakash Mitter, (1971) 1 S.C.C. 396 (India) (hereinafter "Mitter")

[89] Mitter, *supra* note 88 at 399. *See also*, Pooja Jha, *Is article 217(3), an exception to article 74(1) of the Constitution of India?*, (2001) 5 S.C.C. (JOURNAL) 11.

Justice of India" and the decision of the President is declared to be final.[90] The President's decision was questioned on the ground that, "... the decision was in truth rendered by the Chief Justice of India and not the by the President."[91] The argument was rejected since the President had "expressly recorded that he accepted the advice tendered by the Chief Justice of India and that he decided that the age of the respondent be determined on the basis that the respondent was born on [27th December, 1901]. The President acted on the advice of the Chief Justice: he did not surrender his judgment to the Chief Justice."[92] The nature of article 217(3) was then explained in the following words:

> It is necessary to observe that the President in whose name all executive functions of the Union are performed is by Article 217(3) invested with judicial power of great significance which has bearing on the independence of the Judges of the higher Courts. ... Having regard to the very grave consequences resulting from even the initiation of an enquiry relating to the age of a Judge, our Constitution makers have thought it necessary to invest the power in the President. ... The President acting under Article 217(3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers.[93]

It has been argued that this opinion, delivered by Chief Justice J. C. Shah for the unanimous six judge bench, makes article 217(3) an exception to the

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[90] INDIA CONST. art. 217, § 3. ("If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final.")

[91] Mitter, *supra* note 88 at 405

[92] *Id.*

[93] *Id.* at 410-11

Presidential Aid & Advice Clause.[94] It stands to reason that if article 217(3) is an exception to the Presidential Aid & Advice Clause, and the objective of such an exception to is to preserve the independence of judiciary from the executive, which was a concern expressed unanimously by all members of the Constituent Assembly who spoke on May 24th, 1949 (when the Judges Appointment Clause was debated), then a question may validly be asked – what other constitutional provisions are covered by the same exception?[95] It is not the purpose of this article to investigate this question in detail. However, any inquiry on this question must begin by questioning the weight and authority usually granted to *Shamsher Singh*.

The Central Vigilance Commissioner Appointment Case

In the famous *CVC Appointment Case*[96] a unanimous three judge bench of the Supreme Court struck down the appointment of the Central Vigilance Commissioner (CVC) as "non est in law."[97] The Central Vigilance Commission, as per the Preamble of the Central Vigilance Commission Act, 2003, was constituted to "inquire or cause inquiries to be conducted into offences alleged to have been committed under the Prevention of Corruption Act, 1988 by certain categories of public servants of the Central Government, corporations established by or under any Central Act, Government companies, societies and local authorities owned or controlled by the Central Government and for

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[94] *See* Jha, *supra* note 89 at 11. ("The net result of [Mitter] is that Article 217(3) becomes an exception to Article 74(1) of the Constitution.") Jha, however, feels that the conflict between *Shamsher Singh* and *Mitter* must be resolved in favour of *Shamsher Singh*. *See, id* at 13.

[95] *See, e.g.* INDIA CONST. art. 75, § 1. Article 75(1) provides for the appointment of the Prime Minister and it is generally accepted that this is one area where the President is not bound by the advice of the existing Council of Ministers. *See* Ismail, *supra* note 31 at 12.

[96] Center for Public Interest Litigation v. Union of India, (2011) 4 S.C.C. 1 (India) (hereinafter "CVC Appointment Case")

[97] *Id.* at 35

matters connected therewith or incidental thereto."[98] The CVC is to be appointed by the President on the recommendation of a High Powered Committee (HPC) consisting of the Prime Minister, the Home Minister and the Leader of the Opposition in the lower house of the Indian Parliament.[99] Any person who has been or is a member of "an All-India Service or in any civil service of the Union or in a civil post under the Union having knowledge and experience in matters related to vigilance, policy making and administration including police administration" is eligible to be considered for appointment as the CVC or a Vigilance Commissioner.[100]

In the instant case, the HPC recommended a candidate (the Leader of the Opposition dissented) to the President whose antecedents were in question.[101] Interpreting the phrase "who have been or are" in section 3(3)(a) of the Central Vigilance Commission Act, 2003, the Supreme Court held that these words, keeping in mind the reason why the said act was enacted,[102] "... indicate that such past or present eligible persons should be without any *blemish* whatsoever and that they should not be appointed merely because they are eligible to be considered for the post."[103] The Supreme Court reasoned that keeping in mind the reason why this institution was created and the sensitive nature of the post and responsibilities vested in this office, it is the duty of the

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[98] The Central Vigilance Commission Act, 2003, available at http://cvc.nic.in/cvcact.pdf, (last visited June 6, 2015), Preamble

[99] *Id.* § 4(1)

[100] *Id.* § 3(3)(a)

[101] CVC Appointment Case, *supra* note 96 at 9-15. The sum and substance of the entire matter was that the person who was recommended and subsequently appointed had certain criminal cases pending against him, but the HPC went ahead and recommended this person's appointment anyway.

[102] *Id.* at 16. Chief Justice Kapadia (for the Court), "In our opinion, the CVC is an *integrity institution*. This is clear from the scope and ambit (including the functions of the Central Vigilance Commissioner) of the 2003 Act."

[103] *Id.* at 20

HPC not to recommend any person who does not satisfy this benchmark.[104] Since the recommended candidate had criminal cases pending against him, he stood disqualified from being considered for appointment as CVC.[105]

In the course of this judgment, Chief Justice Kapadia noted an argument made by the Union of India whereby it was argued that in matters of CVC's appointment the President was bound to act in accordance with the advice tendered by the HPC.[106] Even though the question in the case was not really about the binding nature of the HPC's advice to the President, the Chief Justice accepted the position put forward by the Attorney General.[107] However, it would be a very strange proposition to maintain that the Indian President, who is sworn to preserve, protect and defend the Constitution and the law of the Republic, would be bound by an advice tendered by the HPC when he clearly knows that the advice tendered is against the law as declared by the Supreme Court.

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[104] *Id.* at 21, 22

[105] *Id.* at 24. Chief Justice Kapadia (for the Court), "The HPC has to look at the record and take into consideration whether the candidate would or would not be able to function as a Central Vigilance Commissioner. Whether the institutional competency would be adversely affected by pending proceedings and if by that touchstone the candidate stands disqualified then it shall be the duty of the HPC not to recommend such a candidate."

[106] *Id.* at 29-30. (It was accordingly submitted on behalf of the Union of India that this advice of the Prime Minister under Article 77(3), read with Article 74 of the Constitution is binding on the President. That, although the recommendation of the [HPC] may not be binding on the President proprio vigore, however, if such recommendation has been accepted by the Prime Minister, who is the authority concerned under Article 77(3), and if such recommendation is then forwarded to the President under Article 74, then the President is bound to act in accordance with the advice tendered.)

[107] *Id.* at 32

The Disqualification of Ministers Case

The *Disqualification of Ministers Case,*[108] decided by a unanimous Constitution Bench of five judges of the Supreme Court in 2014, is the last case and the most recent in this series of cases, a close reading of which demonstrates the shortcomings of the *Shamsher Singh* view. This case reached the Supreme Court directly through article 32 by way of writ petition that was filed, "... assailing the appointment of some of the original respondents as Ministers to the Council of Ministers of Union of India despite their involvement in serious and heinous crimes."[109] As per article 75(1) of the Constitution (let us call it the Ministerial Appointments Clause), the Ministers are appointed by the President upon the advice of the Prime Minister. The issue in this case centered on interpretation of article 75(1).[110] The Court took note of the very strong contention made for the petitioners by a senior counsel appearing as *amicus* that, "... it is the constitutional obligation on part of the Prime Minister not to recommend any person to be appointed as a Minister of the Council of Ministers who has criminal antecedents or at least who is facing a criminal charge in respect of heinous or serious offences."[111] Relying on the doctrine of implied limitations, which the Court accepted as a part of Indian

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[108] Manoj Narula v. Union of India, (2014) 9 S.C.C. 1 (India) (hereinafter "Manoj Narula")

[109] *Id.* at 21

[110] INDIA CONST. art. 75, § 1. (The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.); Manoj Narula, *supra* note 106 at 21 (Justice Misra (for the Chief Justice, himself and Justice Bobde), 64 (Justice Lokur, concurring). Whereas Justice Misra captures the constitutional issue raised before the Constitution Bench as – "... we are required to interpret the scope and purpose of Articles 75 and 164 of the Constitution, regard being had to the text, context, scheme and spirit of the Constitution." Justice Lokur captured the essence of the issue very succinctly – "... is it necessary to read any other implied limitation in the Constitution concerning the appointment of a person as a Minister in the Government of India, particularly any implied limitation on the appointment of a person with a criminal background or having criminal antecedents?"

[111] Manoj Narula, *supra* note 108 at 30

constitutional jurisprudence[112], it was argued article 75(1) should be understood to impliedly mean that "... the Prime Minister, while giving advice to the President for appointment of a person as Minister, is not constitutionally permitted to suggest the name of a person who is facing a criminal trial and in whose case charge/charges have been framed."[113] The following bit of the argument is important to note for the purpose of this article:

> *However, the President, being the Executive Head of the State, can refuse to follow the advice, if there is constitutional prohibition or constitutional impropriety or real exceptional situation that requires him to act to sustain the very base of the Constitution. The learned Senior Counsel would submit that the President, in exercise of his constitutional prerogative, may refuse to accept the advice of the Prime Minister,* if he finds that the name of a Member of Parliament is suggested to become a Minister who is facing a criminal charge in respect of serious offences.[114]

Before proceeding forward, we must note that nothing much became of this argument in this case. The argument was duly noted by the Court in its opinion, but the issue in the case was pertaining to the Ministerial Appointments Clause and not the Presidential Aid & Advice Clause. The petitioners in this case wanted the Court to hold that the appointment of the person facing criminal charges of a heinous or serious nature to a position

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[112] *Id.* at 44. Justice Misra (for the Chief Justice, himself and Justice Bobde; Justices Lokur and Joseph concurring), "... it is luminescent that the principle of implied limitation is attracted to the sphere of constitutional interpretation ... the concept of implied limitation was read into Article 368 to save the constitutional integrity and identity."

[113] *Id.* at 30

[114] *Id.* at 31. (Emphasis added)

such as a Minister in the Union or the State cabinet is constitutionally prohibited. Such a restriction on ministerial appointments, as a restriction on Prime Ministerial power to advice the President to make such an appointment, was attempted to be deduced from the Constitution. The first method of this deduction was the use of the doctrine of implied limitations, but it was not accepted by the Court.[115] The second method invoked the theory of "constitutional silences" to deduce this restriction on Prime Ministerial power, but this was also squarely rejected.[116] The third method involved the invocation of the doctrine of "constitutional implications" and this was also rejected.[117] Thus the unanimous court held that: "... while interpreting Article 75(1), definitely a disqualification cannot be added. *However, it can always be legitimately expected, regard being had to the role of a Minister in the Council of Ministers and keeping in view the sanctity of oath he takes, the Prime Minister, while living up to the trust reposed in him, would consider not choosing a person with criminal antecedents against whom charges have been framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers.*"[118]

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[115] *Id.* at 44, 45. Justice Misra (for the Chief Justice, himself and Justice Bobde; Justices Lokur and Joseph concurring), "... we are of the convinced opinion that when there is no disqualification for a person against whom charges have been framed in respect of heinous or serious offence or offences relating to corruption to contest the elections, by interpretative process, it is difficult to read the prohibitions into Article 75(1) ... to the powers of the Prime Minister ... in such a manner. That would come within the criterion of eligibility and would amount to prescribing an eligibility qualification and adding a disqualification which has not been stipulated in the Constitution."

[116] *Id.* at 46. Justice Misra (for the Chief Justice, himself and Justice Bobde; Justices Lokur and Joseph concurring), "The question that is to be posed is whether taking recourse to this doctrine for the purpose of advancing constitutional culture, can a court read a disqualification to the already expressed disqualifications provided under the Constitution ... The answer has to be in the inevitable negative, for there are express provisions stating the disqualification and second, it would tantamount to crossing the boundaries of judicial review."

[117] *Id.* at 47-48

[118] *Id.* at 56. (Emphasis added)

It is to the emphasized portion of the Court's holding to which we now turn. Let us carefully note what was being argued in this case. It was argued by the *amicus*, as reproduced above, that President being the Executive head may refuse to follow the advice of the Prime Minister as tendered under the Ministerial Appointments Clause. Such a rejection, went the argument, would be constitutionally permissible in three situations: (1) a constitutional prohibition; (2) constitutional impropriety; or (3) a real exceptional situation that requires the President to act to sustain the very base of the Constitution. It was also argued for the Petitioners, by their own counsel, and in support of the *amicus*, that:

> "The Prime Minister, while giving advice to the President for appointment of a person as a Minister, is required to be guided by certain principles which may not be expressly stated in the Constitution but he is bound by the unwritten code pertaining to morality and philosophy encapsulated in the Preamble of the Constitution. The learned counsel emphasized on the purposive interpretation of the Constitution which can *preserve, protect and defend* the Constitution regardless of the political impact."[119]

The point being made by counsel is a bit confusing. The Prime Ministerial power to advise the President to appoint a certain person as a Minister is restricted only by express constitutional and statutory provisions whereby if a person is disqualified from being a member of the legislature (at the Union or the State level), such a person is automatically disqualified from being appointed as a Minister (for a Minister must be a member of the legislature).[120] Beyond these express restrictions, any other restrictions on these powers cannot be implied (and it was held so in this case as well). However, both the

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[119] *Id.* at 32. (Emphasis added)

[120] *See* B. R. Kapur v. State of Tamil Nadu, (2001) 7 S.C.C. 231 (India)

counsel for the petitioner as well as the *amicus* arguing the petitioner's position laid stress on the oath of office – in the former case the stress was indirect (since he never quoted the Presidential Oath of Office but used the exact expression from that oath – "protect, preserve and defend the Constitution") and in the latter case it was direct as he "... stressed on the concept of the sanctity of the oath that pertains to allegiance to the Constitution ...".[121]

The oath to "protect, preserve and defend the Constitution" cannot be used to read restrictions (express or implied) on the Prime Ministerial power to advice the President on the appointment of Ministers under the Ministerial Appointments Clause, as was argued by petitioner's counsel. The Prime Ministerial oath is not to preserve, protect and defend the Constitution as noted above. The use of the Prime Ministerial oath to read constitutional restrictions on Prime Ministerial power under the Ministerial Appointments Clause, as attempted by the *amicus*, is also not a very fruitful proposition. Let us assume that the point being made by the *amicus* was accepted – that there is an implied constitutional prohibition on the Prime Minister under the Ministerial Appointments Clause not to advice the President to appoint a person facing a criminal charge as a Minister in the Union cabinet. Who will enforce this constitutional prohibition? Presumably the Supreme Court. Consider the implications of such position. Do we really want the Supreme Court taking a final call as to who should or should not be appointed as a Minister? This would be an unprecedented expansion of the writ of *quo warranto* because there is no express prohibition anywhere in the Constitution or the laws of the Indian Republic whereby a person facing a criminal charge may not be appointed as a Minister. That such a person ought not to be appointed as a Minister is a proposition of public morality and not constitutional law. But there is nothing in the Constitution that prohibits the

[121] Manoj Narula, *supra* note 108 at 38

Indian President from rejecting the advice tendered by the Prime Minister on the ground that appointment of such a person would be in violation of a constitutional propriety. It is also far easier and more flexible for the Prime Minister to convince the President that such person's appointment is not prohibited by the Constitution, compared to such an appointment being challenged before the Supreme Court by a writ of *quo warranto* or any other suitable writ. But for such position to be there, it must first be conceded that *Shamsher Singh* is not a rule of universal but only of general application and exceptions thereof can and do constitutionally exist.

PART – II – A CASE FOR THE INDIAN MODEL OF SEMI-PRESIDENTIALISM

A. Evidence from the Constituent Assembly Debates

Debates on the Presidential Aid & Advise Clause

Draft of article 61, that was later to become the Presidential Aid & Advise Clause[122], was debated on December 30th, 1948.[123] As originally written, this clause only stated that the President is supposed to "act in accordance" with the advice tendered by the Council of Ministers that will be headed by the Prime Minister. Later, in 1977, by the 42nd Amendment, a proviso was added to this clause that made it mandatory for the President to act on the advice tendered by the Council if the same advice is tendered a second time.[124] It is important to note that the original text of the Constitution does not mandate

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[122] INDIA CONST. art. 74, § 1. (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 ...)

[123] CONSTITUENT ASSEMBLY DEBATES, VOL. VII, 1141-1165 (30th December, 1948)

[124] INDIA CONST. Art. 74, § 1, Proviso. (Provided that the President may require the Council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration.)

that the President is, in all circumstances, bound by the advice tendered by the Council.

Mahboob Ali Baig raised a very interesting objection to this clause on the ground that Parliamentary democracy "is not democracy at all".[125] Professor K. T. Shah introduced an amendment whereby he suggested that the phrase "with the Prime Minister at the head" in the Presidential Aid & Advise Clause should be deleted.[126] Explaining the reason behind his proposed amendment, Professor Shah raised a concern that he raised again at another point of time in the debates that is discussed later in this article. Professor Shah's words are worth reproduction in full:

> "The second reason I have for suggesting this amendment is that I regard the Ministers to be not only equal among themselves, but because, if for any reason, the Prime Minister may be unwelcome or any of his colleagues becomes unwelcome, we should not be obliged to have a complete change of the entire Ministry. *The power which this Constitution as a Constitution seeks to confer upon the Prime Minister makes it inevitable that a degree of power will*

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[125] CONSTITUENT ASSEMBLY DEBATES, VOL. VII, *supra* note 123 at 1141-42. Mahboob Ali Baig said, "According to me, Parliamentary Democracy is not democracy at all. Democracy, according to me, is not a rule by mere majority; b it is rule by deliberation, by methods of deliberation on any particular matter, by taking into consideration all sections, who make up the people in general. Now let us see what happens, at the time of the formation of a cabinet. Take for instance, the case of a Parliament consisting of 200 members. If 105 members were returned by a particular party, one of the members who is elected as the leader out of the 105 - and he may have been elected by a majority of only 60, he is called by the President and is asked to form the Government. That is, out of the two hundred members, the man who gets 60 votes is called by the President to form the government and he becomes Prime Minister and this Prime Minister chooses his own men without reference to the will and to the opinion of his party, or of the members of the Parliament. He may choose his own men. ... Therefore, my submission is that this kind of appointment of the Executive to rule over the country is anything but democratic."

[126] *Id.*

> *concentrate in his hands, which may very likely militate against the working of a real, responsible and democratic government."*[127]

After Professor Shah's speech, Mohammad Tahir moved for two crucial amendments whereby he suggested that at the end of the Presidential Aid & Advise Clause the following words should be inserted: "except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion."[128] He also suggested adding another sub-clause that clarifies which functions the President was to discharge on his own discretion and which ones on the advice of the Council was to be final.[129] It does not take much imagination to see that Mohammad Tahir's amendments envisaged an Indian President that was constitutionally closer to the American President. But his speech explaining the reasons why he was introducing this amendment shows that Tahir didn't actually have the American President in mind. He only wanted to give the Indian President the "freedom of using his discretionary powers."[130] The other reason that he gave was regarding a structural incongruity in the constitution that was being debated, an incongruity that continues to this day and which the Supreme Court has not been able to square as well:

> In moving these amendments, I want that the President of India, although he is a "nominal President" in the words of my honorable Friend Mr. Kamath, still I want that the President

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[127] *Id.* (Emphasis added)

[128] *Id.* at 1145. However, this amendment was eventually rejected.

[129] *Id.* The clause as suggested by Mohd. Tahir, read as follows – "If any question arises whether any matter is or is not a matter as respects which the President is by or under this Constitution required to act in his discretion, the decision of the President in his discretion, shall be final and the validity of anything done by the President shall not be called in question on the ground that he ought not to have acted in his discretion."

[130] *Id.*

should not be tied down all round. At least this House should be generous enough to give him the freedom of using his discretionary powers.[131] *In introducing this exception, I would submit that it is not a novel exception; if you will be pleased to look at article 143 of the Draft Constitution you will find that the same exception has been allowed in respect of the Governors and the Ministers of the State. When the Governors of the States have been given power to exercise certain powers in their discretion, I do not see any reason why this innocent power should not be granted to the President of India."*[132]

Tahir's amendments were opposed by Tajamul Hussain.[133] Two arguments were presented. The first was the presence of similar powers to the Governor-General under the Government of India Act, 1935 and the misuse of these powers by the British to keep the Congress Ministries "under check."[134] The second was a comparison of the office of the Indian President with the King of England.[135] It does not take much elaboration to establish that both of these

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[131] This sentence from Tahir's speech may be read along with another speech that he had made a day before the Constituent Assembly when the Presidential power to suspend, remit or commute a sentence was being discussed. *See* CONSTITUENT ASSEMBLY DEBATES, VOL. VII, *supra* note 123 at 1118. Tahir, as it happened, was a big supporter of the idea that the Indian President must be given some independent powers. He never suggested that an American style presidential government should be wholesale imported into India. To that effect, he was actually in favour of the Parliamentary and Cabinet system. But he did suggest that, "Sir, in my opinion, the President only should have power to suspend, remit, or commute a sentence of death. He is the supreme Head of the State. It follows therefore that he should have the supreme powers also."

[132] CONSTITUENT ASSEMBLY DEBATES, VOL. VII, *supra* note 123 at 1145-46

[133] *Id.* at 1154

[134] *Id.* Tajamul Hussain said, "We do not want the President or the Governor to use his individual discretion at all. In those days when the British were here they wanted to safeguard their own interest under the Government of India Act, 1935. That was absolutely necessary under that Act to check the Congress Ministries in their opinion, but now everything has changed."

[135] *Id.* Tajamul Hussain said, "His Majesty the King of England does not exercise his individual discretion at all. He merely follows the advice tendered by the Cabinet. If he

objections were unsound and based on comparisons that cannot be made.[136] The British misused their power because they were colonial occupants. They would have devised a method of keeping Congress ministries "under check" one way or the other. A British Governor-General appointed by a colonial government under a colonial law cannot be compared to an elected head of the state in a free country under a written republican constitution. Also, the

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does not accept the advice, he must go and not the Cabinet. Ultimately he will have to go. Therefore we have been mostly following the British Constitution which has worked so well - and I am also an admirer of the British Constitution - I think that there should be not question of individual discretion at all. If advice is tendered by the Cabinet, the President must accept that."

[136] *See, e.g.* CONSTITUENT ASSEMBLY DEBATES, VOL. VII, *supra* note 123 at 1158. Responding to these proposed amendments, Dr. Ambedkar also made a similar point. He said, "... my friend, Mr. Tahir ... wants to lay down that the President shall not be bound to accept the advice of the Ministers where he has discretionary functions to perform. It seems to me that Mr. Tahir has merely bodily copied Section 50 of the Government of India Act before it was adopted. Now, the provision contained in Section 50 of the Government of India Act as it originally stood was perfectly legitimate, because under that Act the Governor-General was by law and statute invested with certain discretionary functions, which are laid down in Section 11, 12, 19 and several other parts of the Constitution. Here, so far as the Governor-General is concerned, he has no discretionary functions at all. *Therefore, there is no case which can arise where the President would be called upon to discharge his functions without the advice of the Prime Minister or his cabinet.*" (Emphasis added). The italicized portion of Dr. Ambedkar's speech may give the impression that he wished to stress the point that the Indian President would be bound by the advice of the Council like the King of England is bound the advice of the British cabinet. But in fact this would be an unfair reading of Dr. Ambedkar's words. He is merely stressing that both the President and the Prime Minister are supposed to work together. If such is the case that it cannot be imputed to these words an intent on Dr. Ambedkar's part that he intended the Indian President to be a nominal or a figure-head president. As we would see later in this paper that Dr. Ambedkar never intended to provide for nominal or figure-head Indian President. Here, we may briefly refer to Dr. Ambedka's speech on 29th December, 1948 when provisions regarding Presidential elections were being debated. *See* CONSTITUENT ASSEMBLY DEBATES, VOL. VII, *supra* note 123 at 1100. Dr. Ambedkar said, "The President is the Head of the State and *his powers extend both to the administration by the Centre as well as of the States*. Consequently, it is necessary that in his election, not only Members of Parliament should play their part, but the Members of the State Legislatures should also have a voice." It stands to reason that Dr. Ambedkar insisted on including the Members of State Legislatures in the college of Presidential electors, because he never intended that all the "powers" of the President were in the end would be effectively exercised only by the Prime Minister and the Council of Ministers, in the elections of whom the Members of State Legislatures have absolutely no role to play, except apart from casting their own vote in general elections.

English Crown is a hereditary office that does not come with an oath to "preserve, protect and defend the Constitution". There is no comparison to be made between the British Monarch and the Indian President.

Putting the British constitutional system in context, K. Santhanam, cautioned that the Presidential Aid & Advise Clause, "... should not be interpreted literally, because they embody conventions of the cabinet system of government evolved in Great Britain as a result of a long struggle between the King and the Parliament."[137] Santhanam's views make it clear that even though the British position where executive power truly vests in the Cabinet was being imported into India, the intention was never to have wholesale import of the British system.[138] The Presidential Aid & Advise Clause generally means that "it is the Prime Minister's business with the support of the Council of Ministers, to rule the country and *the President may be permitted now and then, to aid and advise the Council of Ministers.*"[139]

Debates on Appointment of Judges in Higher Judiciary

The views expressed in the Constituent Assembly during the drafting of the clauses of the Constitution that were to govern the appointment of judges to the Higher Judiciary (i.e. the judges of the High Courts of the States and the Supreme Court of India) shed some light on the apprehensions of some very eminent members of the Constituent Assembly regarding concentration of powers in the office of the Prime Minister.

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[137] CONSTITUENT ASSEMBLY DEBATES, VOL. VII, *supra* note 123 at 1155

[138] *Id.* Santhanam said, "At every stage of this struggle [between the King and the Parliament], the King yielded some power, but was anxious to preserve his prestige. Therefore, at the end of the struggle, the King gave up all his power, but preserved all his forms. Therefore, it is said here 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."

[139] *Id.* (Emphasis added)

Mahboob Ali Baig Sahib introduced an amendment in the draft article 103 (that was later to become article 124 of the Constitution[140]) whereby he suggested that the appointment of judges to the Supreme Court and the High Courts must be with the "concurrence" of the Chief Justice of India.[141] A similar amendment was moved by B. Pocker Sahib, whereby stress was placed on the "concurrence" of the Chief Justice of India.[142] Pocker Sahib's primary concern in making these appointments subject to concurrence of the Chief Justice of India was to insulate the process of appointment of judges from possible political influences that might be exerted by the executive branch of the government.[143] The need to insulate the procedure of appointment of judges of the Supreme Court was also stressed by Professor K. T. Shah[144] but his solution

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[140] INDIA CONST. Art. 124, § 2. (Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such Judges of the Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years: Provided that in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted ...)

[141] CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, 238 (May 24th, 1949). *See also id.* at 231 where Prof. Shibban Lal Saxena, who while did not move an amendment to this effect, did in his speech express a similar point. Prof. Saxena argued, "Every judge of the Supreme Court should be appointed on the advice merely of the Supreme Judge of the Supreme Court, so that they may derive their authority from the Chief Justice and not the Executive."

[142] *Id.* at 232. The full text of the proposed amendment read as follows: "Every judge of the Supreme Court other than the Chief Justice of India shall be appointed by the President by warrant under his hand and seal after consultation with the concurrence of the Chief Justice of India; ..."

[143] *Id.* 233. Explaining the reasons behind his proposed amendment, Pocker Sahib in his speech said, "It is of the highest importance that the Judges of the Supreme Court should not be made to feel that their existence or their appointment is dependent upon political considerations or on the will of the political party... [I]f a judge owes his appointment to a political party, certainly in the course of his career as a Judge, also as an ordinary human being, he will certainly be bound to have some consideration for the political views of the authority that has appointed him. That the Judges should be above all these political considerations cannot be denied."

[144] *Id.* at 234-35. Professor Shah, in his speech explaining the reasons behind his proposed amendment said, "Sir, this is an amendment seeking to make the appointment of Judges free from any particular influence."

was a little different. He proposed an amendment whereby the Upper House of the Parliament (i.e. the Council of States) was to be consulted by the President in matters of judicial appointments.[145]

Professor Shah was fearful that the Constitution was concentrating way too much power in the office of the Prime Minister. So long as the Prime Minister continues to enjoy confidence of the House (i.e. the Parliament), the occupant of the office may do whatever he or she wishes to do with no other constitutional body acting as a check on the Prime Minister's powers. His apprehensions are clear from the following statement he made in the Constituent Assembly explaining the reasons behind his proposed amendment:

> "In my opinion, Sir, if I may say so with all respect, this Constitution concentrates so much power and influence in the hands of the Prime Minister in regard to the appointment of judges, ambassadors, or Governors to such an extent, *that there is every danger to apprehend that the Prime Minister may become a Dictator if he chooses to do so.*"[146]

Later, when all the amendments were being debated in the Constituent Assembly, the need of having "first-rate" judges of "highest integrity" who could "stand up against the executive" was stressed by Jawaharlal Nehru, who would later become the first Prime Minister of independent India.[147] Nehru

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[145] *Id.* at 234. Full text of Professor Sha's amendment read as follows: "Every judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with the Council of States and such of the judges of the Supreme Court and of the High Courts in the States as may be necessary for the purpose ..."

[146] *Id.* at 234. (Emphasis added)

[147] *Id.* at 247. Jawaharlal Nehru, while did not support the amendments proposed by Professor Shah, did stress the need to having a completely independent judiciary. He said, "It is important that these judges should not be only first-rate, but should be acknowledged to be first-rate in the country, and of the highest integrity, if necessary,

also stressed the need of insulating the judges of the higher judiciary from "political affairs".[148] Dr. Ambedkar also expressed similar views.[149] During this debate, M. A. Ayyangar took this point a little forward by specifically referring to the powers of judicial review that were being placed in the Supreme Court and the High Courts. His words are worth reproduction in full:

> "The Supreme Court is the watchdog of democracy. In an earlier part we enacted the Fundamental Right[s] and we are very anxious to provide the means by which these Fundamental Rights could be guaranteed to the citizens of the Union. This is the institution which will preserve those rights and secure to every citizen the right[s] that have been given to him under the Constitution. Therefore naturally this must be above all interference by the Executive. ... *Therefore at every stage, from the stage of appointment of the judges, their salaries and tenure of office, all these have to be regulated now so that the executive may have little or nothing to with their functioning.*"[150]

Rohini Kumar Chaudhari, who made an important speech in this respect, rejected the idea of a "concurrence" clause whereby the Chief Justice of India's opinion in matters of appointment of judges to the higher judiciary was to be binding.[151] But he didn't entirely accept the idea that the proverbial buck will

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people who can stand up against the executive government, and whoever may come in their way."

[148] *Id.* at 247. Nehru said, "But the High Court Judges and Federal Court Judges should be outside political affairs of this type and outside party tactics and all the rest ..."

[149] *Id.* at 258. Dr. Ambedkar said, "... I quite agree that the point raised is of the greatest importance. There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself."

[150] *Id.* at 253

[151] *Id.* at 252. R. C. Chaudhary said, "I want now to say a word about "consultation". In my opinion the amendment suggested by Dr. Ambedkar for the deletion of the line

stop with the Prime Minister in this matter and that the President would be bound by the Aid & Advice of his Council in matters of judicial appointments.[152] That the Council of Ministers that would be acting in Aid & Advice of the President would be dominated by the Prime Minister is a proposition that requires no detailed elaboration. If such would be the case, then the President would naturally be forced to accept whatever advice is tendered by his Council and it is undeniable that this advice would be based on political considerations and party politics. But the consistent stress throughout the debate on provisions regarding judicial appointments in the higher judiciary was to make sure these appointments were not influenced by the political winds of the day in any way. One method to counter a strong Prime Minister willing to act like a "dictator" in Professor Shah's words, was to vest this function exclusively with the President. And this was in fact suggested by Chaudhari:

> *"After all, this is a matter which should be entirely dealt with by the President. He can, if he likes, consult anybody; if he does not like, he need not consult anybody. If he knows the man to be of outstanding ability, it is not necessary for the President to consult anybody. It should not be made obligatory.* I think that the interpretation of this article is that the President is not bound to consult anybody if he does not consider it necessary to do so. If that is the interpretation, well and good."[153]

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where it is said that after consultation with such of the judges of the Supreme Court and of the High Court in the States where necessary should be accepted."

[152] *Id.* at 252. R. C. Chaudhary said, "After all, this is a matter which should be entirely dealt with by the President."

[153] *Id.* at 252. *See also id.* at 231 where Prof. Shibban Lal Saxena also expressed a similar view. In his opinion, "... *the President shall and will be the prime moved in the appointment* but if the name he chooses is not one which can be approved by the

If we are concerned with the possibility that the office of the Prime Minister is being vested with too many powers, and that if they are in the hands of the wrong person the powers may be used in a "dictatorial" fashion (a prediction that came true within the three decades of the adoption of the Constitution), one of the methods to control the Prime Minister is to vest selected powers in the hands of the President. In other words, whereas generally the Prime Minister enjoying the confidence of the Parliament is free to run the country as is deemed fit, certain selected powers should be placed in the hands of the President so that the Prime Minister would not become too powerful.

Therefore the idea that whereas generally the President is bound by the Aid & Advice of his Council of Ministers and is to do as advised by his Council is a correct interpretation of the Aid & Advice Clause, but to insist that the Indian President is in all circumstances bound by the Aid & Advice of his Council and is nothing but a figure-head or a nominal president is an inaccurate interpretation of the Constitution. The President is bound by the Aid & Advice of his Council *generally* but not in all circumstances. Furthermore, an independent President was envisaged not only by the Constitution, but also in the minds of many eminent members of the Constituent Assembly, as a constitutional device to act as a checking and balancing constitutional office against a very strong Prime Minister with possible dictatorial tendencies.

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members of Parliament by at least two-thirds majority then the name shall be changed and another name shall be proposed ..." (Emphasis added)

Debates from the provisions concerning Presidential power to promulgate Ordinances when the Parliament is not in session

Chapter III of the Indian Constitution deals with the "Legislative Powers of the President." The Indian President is allowed to promulgate "such Ordinances as the circumstances appear to him to require" if he is "satisfied that circumstances exist" that require such a promulgation, and only when "both Houses of Parliament are [not] in session."[154] Any such Ordinance that may be promulgated by the President is equivalent to an "Act of Parliament," has to be laid before the Parliament for its consideration and comes to an automatic end "at the expiration of six weeks from the reassembly of Parliament" unless otherwise approved.[155] The Presidential power to promulgate Ordinances when the Parliament is not in session is subject to the same constitutional limitations as that of the Parliament.[156]

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[154] INDIA CONST. Art. 123, § 1 (If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require.)

[155] *Id.* Art. 123, § 2 (An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance - (a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and (b) may be withdrawn at any time by the President.)

[156] *Id.* Art. 123, § 3 (If and so far as an Ordinance under this article makes any provisions which Parliament would not under this Constitution be competent to enact, it shall be void.); and further Art. 13, § 2 (The State shall not make any law which takes away or abridges the [fundamental] rights ... and any law made in contravention of this clause shall, to the extent of the contravention be void); Art. 13, § 3 In this article, unless the context otherwise requires, - (a) "law" *includes any Ordinance*, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law ...) (Emphasis added) During the debate on article 123 (draft article 102), B. Pocker Sahib introduced an amendment seeking the insertion of a new clause in this article specifically restricting the presidential power to promulgate ordinances so as not to violate the citizen's right to personal liberty. If we carefully examine Art. 13, § 2 of the Constitution, it becomes very clear that an Ordinance is subject to Fundamental Rights provisions. This was pointed out by Dr. P. S. Deshmukh during the drafting and the Pocker Sahib's amendment was rejected. *See* CONSTITUENT ASSEMBLY DEBATES, VOL. VIII,

The draft of article 102, which was later to become article 123 of the Indian Constitution, sought to grant to the Indian President the power to promulgate Ordinances when the Parliament is not in session. This draft was debated on May 23rd, 1949.[157] The very first amendment to the article was proposed by B. Pocker Sahib, who wanted to make sure that an Ordinance depriving any citizen of his "right to personal liberty except on a conviction after trial by a competent court of law" cannot be issued.[158] In his speech to the Constituent Assembly following the introduction of his proposed amendment, Pocker Sahib would articulate an understanding of the presidential power to promulgate ordinances that would eventually be shared by almost all of the members who spoke that day. His understanding of this power was that it was limited to exercise in the event of "some emergency" where "quick action is necessary."[159]

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supra note 141 at 210, Dr. Deshmukh in his speech (he rose to respond the several amendments that were presented and didn't move any amendments himself) said, "In any case fundamental rights having already been approved I do not think there is any need for the amendment moved by Mr. Pocker." *See also* CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 141 at 214. Pocker Sahib's objection was also adequately responded to by Dr. Ambedkar when he pointed his attention to clause (3) of the draft article, that later became Art. 123, § 3, where Dr. Ambedkar said, "I think [Mr. Pocker] has not read clause (3) of article 102. Clause (3) of article 102 lays down that any law made by the President under the provisions of article 102 shall be *subject to the same limitations as a law made by the legislature by the ordinary process*. Now, any law made in the ordinary process by the legislature is made subject to the provisions contained in the Fundamental Rights articles of this Draft Constitution." (Emphasis added).

[157] CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 141 at 202-217

[158] *Id.* at 203. Pocker Sahib's proposed amendment was as follows - "Provided that such ordinance shall not deprive any citizen of his right to personal liberty except on conviction after trial by a competent court of law."

[159] *Id.* at 203. Pocker Sahib said, "After all there may be some emergency in which some extraordinary power has to be exercised, but that should not in any way deprive a citizen of his elementary right, and after all, I do not know why the citizen should be deprived of that right, even though emergencies might arise, in which quick action is necessary ... [A] power to the President to pass ordinances, which give unrestricted powers to deprive the citizens of their liberty, should not be tolerated; ... [T]hough the drafters of this clause may have in view the Communists or such other bodies, even

This "emergency power" understanding of this clause was shared by H. V. Kamath[160] who had introduced an amendment to limit the life of an Ordinance to "four weeks" from the day of its promulgation.[161] This sentiment was shared by Pandit Hriday Nath Kunzuru. Kunzuru recognized that in emergency situations where an "immediate action" was necessary the executive may be allowed to promulgate an Ordinance, but at the same time insisted that it was equally "necessary that Parliament should be summoned to consider the matter as early as possible."[162] This, Kunzuru said, was because the Parliament was required to examine the content of the Ordinance promulgated by the President and to review whether or not there genuinely existed a situation that required the promulgation of an Ordinance in the first place.[163] Regarding the

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that is no justification for depriving the citizens of their liberty, entirely by such ordinances and that too indefinitely."

[160] *Id.* at 205. H. V. Kamath, in his speech after the introduction of his amendment referred to draft article 275, which later became article 352 (that authorizes the proclamation of a state of emergency arising out of a war, external aggression or armed rebellion; the word "armed rebellion" was substituted for "internal disturbance" by the 44th Amendment), and said, "If we turn to article 275, there it is definitely laid down ... that a Proclamation "shall cease to operate at the expiration of six months...". But, here, as I have already pointed out, this lacuna has crept in and I would be happy if it is definitely laid down that an ordinance promulgated by the President would expire at the end of six months."

[161] *Id.* at 204-205. The article, after H. V. Kamath's proposed amendment would have read – "Every such ordinance, shall be laid down before both Houses of Parliament within four weeks of its promulgation ... ." Kamath was particularly concerned that there was no provisions in the Constitution that provided "for the life of an ordinance by the President." He was additionally concerned that the President may misuse this power by not summoning the Parliament at all and thus artificially increasing the life of the Ordinance.

[162] *Id.* at 206. In his speech after proposing his amendment where he suggested that the life of an Ordinance be restricted to "six weeks", Kunzuru said, "The power of passing an Ordinance is equivalent to giving the executive the power of passing a law for a certain period. *If there is such an emergency in the country as to require that action should be immediately taken by the promulgation of an Ordinance,* it is obviously necessary that Parliament should be summoned to consider the matter as early as possible." (Emphasis added)

[163] *Id.* at 207. In Kunzuru's own words, "The executive in a hurry pass an Ordinance which enough partially necessary, may not be required in all its details. *It is therefore necessary that the legislature should be given an opportunity, not merely of considering*

substance of the promulgated Ordinance, Kunzuru was more concerned with ordinances concerning a situation where "peace and security of the country" were in jeopardy as against a situation where an ordinary "tariff law" might be required to be changed immediately for some economic reason.[164] This "emergency only" understanding was further shared by Prof. K. T. Shah[165] and he also favored this "Maximum Period" clause except his suggestion was a bit different.[166]

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the situation requiring the passing of an Ordinance, but also the terms of the Ordinance." (Emphasis added)

[164] *Id.* at 207. Kunzuru made a clear distinction between ordinary laws and emergency laws in the following words, "For instance, if there are certain tariff laws that require to be changed immediately in the economic interests of the country, the Executive may well make the necessary change and nothing may be lost if we wait for six, seven or eight months and the Legislature considers the ordinance only after that. But when the ordinance relates to the peace or security of the country, or to similar circumstances, requiring extraordinary action to be taken by the executive under an Ordinance, then I think, we have to see that the period during which the Ordinance remains in force is as short as possible, and that any legislation that may be required should be passed by Parliament after a due consideration of all the circumstances."

[165] *Id.* at 208. In his speech after introducing his proposed amendment, Prof. Shah said, "Sir, the principle of my amendment is the same as that which found such a powerful support from Pandit Kunzuru ... [An Ordinance] is not legislation passed by the normal Legislature, and yet it would have the force of law which is undesirable ... *[E]ven if it may be justifiable in the hour of emergency*, the very fact that *it is an extraordinary or emergency power*, that it is a decree or order of the Executive passed without deliberation by the Legislature, should make it clear that it cannot be allowed, and it must not be allowed, to last a minute longer that such extraordinary circumstances would require." (Emphasis added)

[166] *Id.* 208-209. Prof. Shah's proposed clause would have read – "Every such Ordinance shall be laid before both Houses of Parliament immediately after each House assembles, and unless approved by either House of Parliament by specific Resolution, shall cease to operate forthwith." In his speech afterwards he showed strong support for a "Maximum Period" Clause in order to strictly restrict the life of an Ordinance. Throughout his speech he made it clear that "if an ordinance has to be passed" it must be so "in the hour of emergency or to meet extraordinary circumstances". He was very clear and emphatic that the presidential power to promulgate Ordinances is "an extraordinary or emergency power" and is not to be exercised lightly. He said, "... I would not leave it to the exigencies, or to the possibilities of party politics, to see that such extraordinary powers are exercised at any time or for any time, and that is why I would require, under the constitution and by the constitution, that a *maximum period* is prescribed to the life of an ordinance ..."

These views expressed by Pocker Sahib, Kamath, Kunzuru and Prof. Shah (and supported by certain others[167]) clearly show that their understanding of the presidential power to promulgate Ordinances was that it was a special power being granted to the President and it was to be exercised only in the most extraordinary of situations, possibly an emergency-like situation. Since an Ordinance was to have the "force and effect" of a Parliamentary legislation but without the actual involvement of the Parliament in the promulgation of the Ordinance, they wanted to get the Parliament involved as soon as possible, and thus suggested that the life of the Ordinance be kept as short as possible (four to six weeks in their collective opinion). This view found support across the aisle and was shared even by those who had opposed the proposed amendments. For instance, Dr. Deshmukh, who spoke only in response to the several proposed amendments to the article and did not propose any amendments himself, said that in the "extraordinary times through which the world was passing" it was "absolutely necessary and desirable" that the President be vested with these "extraordinary powers."[168]

Regarding the way in which President was to exercise the power to promulgate Ordinances, Sardar Hukum Singh proposed an amendment whereby he wanted the phrase "after consultations with his Council of Ministers".[169] Singh clearly felt that this "matter was of such importance" that it "must be expressly put down" and not be left to "conventions [that] have yet

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[167] *See, e.g.* CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 141 at 212. Tajamal Hussain supported the "emergency-only" view. In his speech supporting this view he said, "Ordinances are promulgated only in cases of emergencies."

[168] CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 141 at 211. Dr. Deskmukh said, "... [T]he powers that we are giving to the President are all the more necessary because the day to day administration has become so complex... In the present extraordinary times through which the world is passing, Sir, I think it is absolutely necessary and desirable that the Head of the State should be empowered with these extraordinary powers."

[169] *Id.* at 209. Sardar Hukum Singh's proposed amendment was - "That in clause (1) of article 102, after the words "except when both Houses of Parliament are in session" the words "after consultation with his Council of Ministers" be inserted."

to grow."[170] Singg's views were supported by Tajamal Hussain.[171] Countering Singh's point, Dr. Deshmukh said that "no President will act without the consent of the Cabinet."[172] He went on to say that the President acting as "the guardian of the people" will "not permit any legislative measure to continue for a day more than is absolutely necessary."[173] We may stop here for a moment and ask – how exactly is the President, acting as a guardian of the people, supposed to protect the people against the excesses being practiced by the Council of Ministers with the Prime Minister at its head without conceding to the President at least some autonomy to make a personal decision? In other words, if the Indian President is only a ceremonial president who is bound at all times by the aid and advice of his Council, then how can the President discharge his duty to act as a guardian of the people, the duty that Dr. Deshmukh insists the President must discharge in order to make sure there is no likelihood of this power to promulgate ordinances being misused?

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[170] *Id.* at 209-10. Sardar Hukum Singh in his speech after introducing his amendment explained, "... I feel that a matter of such importance and which is so apparent must be expressly put down. *It may be said that conventions would grow automatically and the President shall have to take the advice of his Ministers.* My submission is that here conventions have yet to grow. We are making our President the constitutional head and we are investing him with powers which appear dictatorial. Conventions would grow slowly and as this constitution is written and every detail is being considered, why should we leave this fact to caprice or whim of any individual, however high he may be?"

[171] *Id.* at 212. Hussain, supporting Singh's position in his speech said, "The amendment moved by Sardar Hukam Singh says that when an Ordinance is promulgated, there should be prior consultation with the Council of Ministers. *It is very reasonable. We should support it.*" (Emphasis added)

[172] *Id.* at 211. Dr. Deshmukh said, "But when the Government is responsible to the Legislature there is no fear of its being abused ... I am sure no President will act without the consent of the Cabinet and no Cabinet will act without the consent of the majority of the Members of the House."

[173] *Id.* Dr. Deshmukh said, "When the powers of withdrawal of Ordinance has been given to the President, I am sure, Sir, he will, as constitutional head – as the guardian of the people – not permit any legislative measure to continue for a day more than is absolutely necessary... [t]here is no likelihood of the legislative powers given to the President being misused and the powers of the sort which have been mentioned in the article are essential."

This question becomes even more important in light of a landmark unanimous five judge constitution bench decision of the Supreme Court delivered in *Dr. D. C. Wadhwa*'s case.[174] We will return to *D. C. Wadhwa* in a moment.

After all members who wanted to speak had finished, Dr. Ambedkar rose to respond to the several views expressed by the members. He was quick to point out that the presidential power to promulgate Ordinances was not a parallel power of legislation and could only be exercised when the Parliament was not in session.[175] The power, he said, was drawn from the British Emergency Powers Act, 1920 whereunder the King was entitled to issue a proclamation only when the Parliament was not in session.[176] Clearly Kamath was not very impressed by this response.[177] But the issue raised by Sardar Hukam Singh was brought to the fore by the President of the Constituent Assembly (Dr. Rajdendra Prasad, who would be later be elected the first

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[174] Dr. D. C. Wadhwa v. State of Bihar, (1987) 1 S.C.C. 378 (India)

[175] CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 141 at 213. Dr. Ambedkar referred to sections 42 and 43 of the Government of India Act, 1935 and stated the power given to the Governor-General under section 43 (which was the power to promulgate ordinances "even when the legislature was in session", thus making the Governor-General a "parallel legislative authority" was not being granted by draft article 102. He said, "The President, therefore, does not possess any independent power of legislation such as the powers possessed by the Governor-General under section 43."

[176] *Id.* at 214. Dr. Ambedkar explained, "If I may say so, this article is somewhat analogous – I am using very cautious language to the provisions contained in the British Emergency Powers Act, 1920. Under that Act, also, the King is entitled to issue a proclamation, and when a proclamation was issued, the executive was entitled to issue regulations to deal with any matter, and this was permitted to be done with Parliament was not in session."

[177] *Id.* Sample the following exchange between Dr. Ambedkar and Kamath –

> "**Shri H. V. Kamath:** Does that mean that when one House only is in session, say, the House of the People, the President will still have this power?
> **The Honourable Dr. B. R. Ambedkar:** Yes, the power can be exercised because the framework for passing law in the ordinary process does not exist.
> **Shri H. V. Kamath:** Shameful, I should say."

President of the Republic of India)[178] because even the presiding officer of the Constituent Assembly had doubts as to whether the President was bound by the advice of his Council at all times.[179] After repeated inquiries by the President on this point, Dr. Ambedkar was not able to clearly point out the part of the Constitution being drafted that made the Indian President absolutely bound to act on the aid and advice of his Council.[180] The President kept on insisting that there is nothing in the text that binds the President to act in accordance with the advice every time the advice is tendered, and Dr. Ambedkar kept on insisting that the President would never be able to act independently from the advice of the Council because the Indian President "is quite different from the President of the United States".[181] As it happened, this dispute was not resolved on May 23rd, 1949.

B. Incongruities and Logical Dilemmas of the "Ceremonial Head" position when read with other constitutional provisions and positions

The Indian President can be impeached for "violation of the Constitution" by bringing a motion for impeachment in either House of the Indian

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[178] *Id.* at 215. (**Mr. President:** There is another amendment which has been moved by Sardar Hukam Singh in which he says that the President may promulgate ordinances after consultation with his Council of Ministers.)

[179] *Id.* at 215. In an exchange between Dr. Ambedkar and the President of the Constituent Assembly, the President very pointedly asked Dr. Ambedkar, "Where is the provision in the Draft Constitution which binds the President to act in accordance with the advice of the Ministers?" To this very pointed inquiry, Dr. Ambedkar could only respond by saying, "I am sure there is a provision..."

[180] *Id.* at 215-16. Dr. Ambedkar's attention was point by some members to the Presidential Aid & Advice Clause. The President insisted that that article "does not say that the President will be bound to accept" the advice of his Council. In response Dr. Ambedkar stated, "If he does not accept the advice of the existing ministry, he shall have to find some other body of ministers to advice him. *He will never be able to act independently of ministers.*" (Emphasis added)

[181] *Id.* at 216

Parliament.[182] Keeping in mind the Presidential oath to preserve, protect and defend the Constitution, such provisions make sense.[183] However, the working of such provision could create considerable difficulty when confronted with the position that the Indian President is only a "ceremonial" President who at all times is bound by the advice of his Council.[184] *Shamsher Singh* presents us with a logical dilemma. On the one hand, if the President stays true to the oath of his office and refuses to act in accordance with the advice of his Council because he has been advised to authorize the commission of an unconstitutional act, then he may be impeached for violating the Presidential Aid & Advice Clause.[185] On the other hand, if the President stays true to the Presidential Aid & Advice Clause as interpreted in *Shamsher Singh* and authorizes the commission of an unconstitutional act, he may be impeached for violating whatever other constitutional provision is applicable.[186]The "anomaly" arising from the Indian President's inability to take any independent action was also noted by Jawaharlal Nehru himself during the drafting.[187]

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[182] INDIA CONST. art. 61, § 1. ("When a President is to be impeached for violation of the Constitution, the charge shall be preferred by ether House of Parliament.")

[183] *Id.* art. 60

[184] *See, e.g.* K. K. Mathew, *The Dilemma of the President and justiciability of a verdict on impeachment*, (1979) 1 S.C.C. (JOURNAL) 1. Mathew, a retired Supreme Court judge, in a post-retirement piece, pointedly asks this question – "If under Article 74, as amended ... the President is bound to act in accordance with the advice of the Council of Ministers except in the narrow sense specified in the concurring judgment of Krishna Iyer, J. in *Shamsher Singh's case* **there is neither reason nor logic in impeaching him if the act done in pursuance of the advice constitutes a violation of the Constitution.**" (Emphasis added; Internal Citations Omitted)

[185] Mathew, *supra* note 184 at 2

[186] *Id.*, *See also* Pai, *supra* note 1 at 4-5. Pai maintains that the President is strictly bound by the Presidential Aid & Advice Clause and is liable to impeachment if he refuses to follow the same.

[187] As noted by Ismail, *supra* note 31 at 35. Justice Ismail, quoting from Nehru's speech from the Constituent Assembly, "Now, therefore, if we had an election by adult franchise and yet did not give [the President] any real powers, it will become slightly

Such logical dilemma remains so long as it is insisted that *Shamsher Singh* is the correct view and is applicable across the board. However, if it is conceded that *Shamsher Singh* is a rule only of general application, then this dilemma can be resolved. If *Shamsher Singh* cannot apply to a situation where the President is of the view that what he has been advised to do by his Council is clearly unconstitutional and in such a situation the President can refuse to act in accordance with such advice, no dilemma arises. And the reason that *Shamsher Singh* only lays down a general rule that it is subject to the exception articulated above is the Presidential oath of office.[188] It may be argued that the Council and the President may legitimately disagree on whether the advice tendered is asking the President to authorize the commission of an unconstitutional act and there might be a deadlock between the Council and the President. However, the President and his Council would be required in such a situation to work out an acceptable compromise, which would require a dialogue between the two. Such dialogue would have to concern itself with the constitutionality and not political expediency of the advice tendered by the Council. In case where the President is still not convinced about the constitutional validity of the advice of his Cabinet, he may refer the question of constitutionality to the Supreme Court.[189] Now, some may still maintain that the power of the President to refer questions of public importance to the

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anomalous and there might be just extraordinary expense of time and energy and money without any adequate result."

[188] Mathew, *supra* note 184 at 2. ("Does his oath not oblige his to protect and defend the Constitution? Can he defend himself in an impeachment proceeding by saying that he violated the Constitution, as he was bound by the advice of the Council of Ministers? It sounds paradoxical that by observing the provisions of the Constitution, namely Article 74, he can with impunity violated its other provisions.")

[189] *See* INDIA CONST. art. 143, § 1. ("If at any time it appears to the President that a question of law or fact has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to that Court for consideration and the Court may, after such hearing as it thinks fit, report to the President its opinion thereon.")

Supreme Court is itself subject to the Presidential Aid & Advice Clause.[190] Such insistence, however, would be misplaced. If the President is to decide whether to act in accordance with the advice of his Council, because the question is on the constitutionality of the actions such advice tendered to the President, it is the President alone in such a situation who can take a call whether to refer the matter to the Supreme Court or not. But a reference to the Supreme Court might not be immediately necessary because the President can also call on the Attorney General or any other member of the Indian Bar to assist him in his decision.[191]

It should be remembered that the Indian Constitution does not keep the Indian President entirely out of the inner workings of his Council. While it is true that the Indian President does not swear an oath of secrecy like any of the Ministers in his Council, it stands to reason that the oath of office of the Indian President is wide enough to allow him the same privilege that one of his Ministers can claim under the Ministerial oath of secrecy. If this were not the case, the Constitution would not impose a duty on the Prime Minister to communicate to the President "such information" regarding administrative affairs as the President "may call for."[192] In the event any matter is not considered by the entire Council and the President feels that it should have been, the President is authorized by the Constitution to have such a matter considered by his entire Council and can issue binding instructions on the

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[190] *See, e.g.* Mathew, *supra* note 184, at 2, 3. ("It is said that in case of doubt the President can avoid this dilemma by referring the question to the Supreme Court under Article 143. But this can ex-hypothesi by done only on the basis of advice by the Council of Ministers and if the Council of Ministers were to refuse to tender that advice, the President will not be able to get the assistance of the opinion of the Supreme Court to enable him to decide whether the advice would involve the doing of an act by him in violation of the Constitution.")

[191] *See* INDIA CONST. art. 76, § 1. ("The President shall appoint a person who is qualified to be appointed a Judge of the Supreme Court to be Attorney-General for India.")

[192] INDIA CONST. art. 78, cl. (b). ("It shall be the duty of the Prime Minister – ...; (b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for; ...")

Prime Minister to that extent.[193] Such unequivocal constitutional text does not quite agree with the tone and tenor as well as the position laid down in *Shamsher Singh*, leading therefore to the conclusion that *Shamsher Singh*'s understanding of the Presidential Aid & Advice Clause is not entitled to such weight and authority as it is generally granted.[194]

The Governor of a State, a position that *Shamsher Singh* held to be almost identical to that of the Indian President, is allowed to withhold his assent to a bill passed by the State Legislature on the ground that such bill derogates the power of and endangers the position of the High Court.[195] In a Parliamentary system, the political party that wins the majority of seats in the legislature gets to form government and stay in office so long as they retain the confidence of the legislature (i.e. are able to maintain their majority in the legislature). The executive branch of the government, in such system, comes from the same majority that controls the legislature.[196] The Council of Ministers or the Cabinet, therefore, is not different from the legislature but a part of it in that it will be a member of the legislature that will eventually be sworn in as a Minister. In such system, it is fair to assume that whatever legislation the

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[193] *Id.* art. 78, cl. (c).

[194] *See, e.g.* Ismail, *supra* note 31 at 9-10

[195] INDIA CONST. art. 200, Third Proviso. ("Provided further that the Governor shall not assent to, but shall reserve for the consideration of the President, any Bill which in the opinion of the Governor would, if it became law, so derogate from the powers of the High Court as to endanger the position which that Court is by this Constitution designed to fill."). *See also*, Pai, *supra* note 1, Ismail, *supra* note 31 at 46.

[196] Richard Albert, *The Fusion of Presidentialism and Parliamentarism*, 57 AM. J. COMP. L. 531 (2009) at 562-63. ("Parliamentary efficiency derives from several sources, including the strictures of party discipline, the fusion of executive and legislative offices, and the executive control of the legislative process. The executive therefore enjoys a "de facto monopoly" in introducing legislation, which contributes to the efficiency in achieving its passage.") (Internal Citations Omitted)

Cabinet wants would be easy to obtain because the same political party also controls the majority vote in the legislature.[197]

Such system has been put in place by the Indian Constitution at the Union as well as the State levels. In such situation, consider this – if the Indian President is only a ceremonial President, then why is the Governor of a State (who nobody elected) allowed to withhold his assent to a State legislation and reserve such legislation for Presidential review? One view is that such withholding clause is put in place to secure judicial independence and serve as a protection against executive arbitrariness.[198]Now, if *Shamsher Singh* is applicable across the board, then the only objective of such withholding clause at State level would be to remove the matter from executive arbitrariness of the State Cabinet and put it in the hands of the Union Cabinet. This is a logically incongruous position. If the State Cabinet, by virtue of its composition and character is presumed to possibly act arbitrarily, then subjecting the same action to the Union Cabinet cannot counter this arbitrariness, since the presumption of arbitrariness would equally attach to the Union Cabinet as it is same in character to the State Cabinet. This incongruity becomes more stark when we examine article 239(2) that is concerned with Gubernatorial powers regarding "administration of Union

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[197] *See, e.g.* Ismail, *supra* note 31 at 13 ("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."); Albert, *supra* note 166

[198] C.S. Subramania Iyer, *Protection for "Judicial Reivew" under the Indian Constitution*, (1955) 68 LAW WEEKLY (JOURNAL SECTION) 31 at 31-32. ("The object of [article 200] is to secure the right of judicial review especially in important matters affecting the liberty of the people, and to see that the jurisdiction of the High Court is not ousted to such an extent as to make the High Court become a non-entity or a second arm of the arbitrary executive authority.")

Territories"[199] that specifically authorizes the Governor to function "independently of his Council of Ministers".[200]

C. Controlled Semi-Presidentialism

The suggestion here is not that *Shamsher Singh* was wrongly decided; this article is not a call for overruling *Shamsher Singh*. This article intends only to show the limitations that *Shamsher Singh* puts on the otherwise flexible text of the Indian Constitution. In *Shamsher Singh* the mode of analysis employed by the Court shows that the Court was divided between two options – is the Indian system like the British system (i.e. British Westminster like Parliamentarianism) or like the American system (i.e. Presidentialism)?[201] Confronted with these two choices the Court leaned towards the British option that was certainly the more attractive of the two options given the

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[199] INDIA CONST. art. 249, § 1. ("Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting, to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify.")

[200] *Id.* art. 249, § 2. ("Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union Territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers."); Ismail, *supra* note 31 at 10, also relies on article 249(2) to support his point that the President is not bound by the aid and advice of his council in all circumstances.

[201] *See ex.* Shamsher Singh, *supra* note 33 at 842 Chief Justice Ray (for himself, Justices Palekar, Mathew, Chandrachud and Alagiriswami concurring) observing, "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 question of law formulated in the concurring opinion by Justice Iyer (Justice Bhagwati concurring) also gives a clear indication of this. *See*, Shamsher Singh, *supra* note 33 at 858, Justice Iyer (Justice Bhagwati concurring) stated the question of law that arose as follows, "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 significance? **Phrased metaphorically, is the Rashtrapati Bhawan or Raj Bhawan – an Indian Buckingham Palace or a half way between it and the White House?**" (Emphasis, in italics, supplied and in bold, added)

apparent similarities of the Indian and the British systems.[202] What eluded all parties involved in this constitutional decision making process was the idea that perhaps the Indian system cannot be classified under either of these two options; that perhaps conventional understanding of both these systems is limiting the understanding of the Indian system that in fact satisfies neither of these two options.[203]

Perhaps the Indian system can be categorized as new experiment in Semi-Presidentialism where the President of the Union of India is not allowed to exercise the executive power of the Union that is vested in his office without seeking the aid and advice of his Council.[204] To that extent, the President's

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[202] *See, e.g.* Shamsher Singh, *supra* note 33 at 859, Justice Iyer (Justice Bhagwati concurring) observing that, "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 knowhow of British constitutionalism" and further at 861, "**Not the Potomac, but the Thames, fertilises the flow of the Yamuna, if we may adopt a riverine imagery.**" (Emphasis added); *see also eg.* Eric Millard, *Duverger's Arguments on Semi-Presidentialism: A Critical Analysis*, 5 ROMANIAN J. COMP. L. 11 (2004) at 12 ("... according to Duverger, many scholars failed to understand the relevance of the semi-presidential category because they were obsessed by the idea of a duality in democratic regimes between presidential and parliamentary, or if we prefer, between the US and English model."); Cindy Skach, *The "newest" separation of powers*, (2007) 5 INT'L J. CONST. L. 93 at 95-96 ("The two constitutional frameworks most common in the democratic world are parliamentarism and Presidentialism ... Until the early 1990s, most democracies fit neatly into one of these two constitutional types.")

[203] Albert, *supra* note 196 at 536-37, 577. Albert cites the Indian Constitution in an attempt to demonstrate that the Indian system is not an exact replication of the British Westminster style Parliamentary system, but rather is an example of "constrained parliamentarism". After an elaborate survey of many systems, Albert concludes, "Presidential and parliamentary systems exhibit many more functional parallels than their distinctive structural features might otherwise suggest. This observation underscores the limitations of existing constitutional theory and makes plain that conventional constitutional conceptions of Presidentialism and parliamentarism are not only limited but quite often mistake."

[204] U.N.R. Rao v. Indira Gandhi, (1971) 2 S.C.C. 63 (India) at 67. In this case, a unanimous seven judge bench held that there shall always be a Council of Ministers to aid & advice the President even when the Parliament has been dissolved by the President, until the next Cabinet is sworn in after the elections. Chief Justice Sikri (for the Court) holding that, "It will be noticed that Article 74(1) is mandatory in form. We

hands are tied in that he cannot act unilaterally.[205] If he does he is not threatened with the possibility of impeachment, the Parliament will keep a check on any tendency on the President"s part to act unilaterally. And generally the President is to act in accordance with the aid and advice of his Council in that in the ordinary everyday governance of the Republic the President is not allowed to second guess his Council, because it is the Council of Ministers that would have to answer the questions from the opposition in the Parliament, not the President.[206] In other words, the Indian President has no constitutional authority to govern the country. [207]

But in the extraordinary situation where high constitutional duties are to be discharged (proclamation of emergencies, issuance of ordinances when the Parliament is not in session, and removal of Governors and granting pardons

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are unable to agree with the appellant that in the context the word "shall" should be read as "may". ... The Constituent Assembly did not choose the Presidential system off 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 function."

[205] SEERVAI, VOL. 2, *supra* note 35 at 2037. Commenting on Shamsher Singh, Seervai noted that, "The conferment of specified discretionary powers on the Governor by Art. 163(2), but not on the President by Art. 74, negatives the view that the President and the Governors have a general discretionary power to act against the advice of the Council of Ministers." Throughout, the position taken in this article is consistent with this view to the extent that the Indian President does not have any constitutional authority to either act unilaterally (i.e. without the aid and advice of his Council) or to act against the advice tendered by this Council. The view taken in this article is that the Indian President can refuse to act on the advice tendered by his Council if the President determines that the advice so tendered amounts to the authorization of commission of an unconstitutional act. In such a case, the President has the constitutional right to refuse to act on the advice so tendered.

[206] *See, e.g.* U.N.R. Rao v. Indira Gandhi, *supra* note 177 at 67

[207] *See, e.g.* Millard, *supra* note 171 at 28. Speaking in the context of the French Fifth Republic, Millard notes that, "It is incontestable that the French President can exercise powers well beyond those the constitution provides him. It is also incontestable that the way he is elected contributes to this. ... it is no less true that even though elected by the people, the President cannot impose his will upon the majority in Parliament. The powers that the President receives from the constitution do not allow him to govern."

could be few examples), the President would not be bound by the aid and advice of his Council if it is clear to the President that the advice tendered by his Council is clearly in violation of the constitutional law of the Republic.[208] In such situations, guided by the oath of his office, the President would have the constitutional authority to disregard and refuse to act upon the advice of his Council should he determine that what he has been advised to do is unconstitutional.[209] Therefore, if the Council advises the President "to take action which is contrary to the Constitution" or where the "Ministers are driven to admit" that what they have advised is unconstitutional, the President can refuse to act on such advice.[210]

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[208] *See, e.g.* SEERVAI, VOL. 2, *supra* note 35 at 2043. Commenting on Shamsher Singh, and questioning the view taken in this decision, Seervai observed that, "It appears to me that if an express provision was not made in our Constitution, obliging the President to follow the advice of his Council of Ministers *in all cases*, it was because of the difficulty of defining precisely and exhaustively the rare occasions on which it was imperative that the President should disregard such advice. It is clear from the judgment of Ray C.J. that the discretionary powers of the Governor need not be express, but may be necessarily implied. The same principle applies to the President."

[209] C. S. Venkatasubramanian, *President's right to dissent*, (1988) 2 LAW WEEKLY (JOURNAL SECTION) 1 at 2 ("Under Art. 60, the President takes the oath of office to "preserve, protect and defend the Constitution" and devote himself to service and the well-being of the people of India. It cannot seriously be contended that this oath is an empty formality. The President is bound by the oath of his office to defend the Constitution against the onslaught thereon from whatever source it may come. It may be from a proposed Constitutional amendment. If a proposed Constitutional amendment seeks to alter the basic structure of the Constitution the President may lawfully withhold his assent, indeed he is bound to withhold his assent. Otherwise, he would have failed in his duty to defend the Constitution. This was the clear position before the 24th Amendment Act. To repeat, the President in every case where a Bill for amendment of the Constitution is presented to him for his assent should consider whether the amendment seeks to alter the basic structure of the Constitution and he has a right and a corresponding duty to withhold his assent if he is of the view that the amendment proposed will alter the basic structure of the Constitution."); SEERVAI, VOL. 2, *supra* note 35 at 2046-48, ¶¶ 18.35, 18.36, Seervai relies on the Presidential oath of office compared with the Coronation Oath of the British Monarch to support the proposition that the Indian Presidency and the British Monarch are constitutional offices that cannot be compared; Iyer, *supra* note 171 at 32-33.

[210] SEERVAI, VOL. 2, *supra* note 35 at 2044, 2048. ("It is a necessary implication of Arts. 60 and 61, that if the Council of Ministers should advise the President to take action which is contrary to the Constitution and the law, or which the Ministers are driven to admit

Since the President would not have the option of acting unilaterally (i.e. without being so advised by his Council), he could simply refuse to act on the advice of his Council. In this way, an independent President becomes a great barrier that would successfully impose constitutional discipline on a majoritarian Parliamentary government.[211] Whereas the Prime Minister, being the head of the Council of Ministers is the head of the Indian Government, the President is the head of the Indian State. Being the head of the Indian State and the only elected high constitutional office holder who swears an oath to preserve, protect and defend the constitution, it is the President's constitutional duty to impose constitutional discipline on his council.[212] In

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is contrary to the Constitution and the law, the President should reject such advice. And if he is unable to form another Ministry, he can direct a dissolution of the House of the People and order a fresh general election. ... the right of the Council of Ministers to advise the President does not extend to advising him to violate a clear mandatory provision of the Constitution.") *See also* Iyer, *supra* note 171 at 33-34.

[211] *See, e.g.* Millard, *supra* note 202 at 29, 33. Speaking in the context of the French Presidency under the Fifth Republic, Millard notes that the French President is, "... a president who is characteristically a guardian of the constitution and of its institutions ... and not a political leader." Millard quotes in support Article 5 of the French Constitution that provides, "The President of the Republic shall ensure due respect for the Constitution. He shall ensure by his arbitration the proper functioning of the public authorities and the continuity of the State. He shall be the guarantor of national independence, territorial integrity and due respect for Treaties," This article interprets the Indian Presidency and the respective constitutional provisions in a similar light. It envisages an independent but a controlled Indian President who never actually intervenes in the inner workings of his Council by insisting that he be a part of the same, but by refusing to accept the advice of his Council whenever it advises the commission of an unconstitutional act, the Indian President imposes constitutional discipline on his Council.

[212] *See, e.g.* Skach, *supra* note 202 at 96. ("The most critical feature of semipresidentialism is the additional separation of powers that comes with the division of the executive into two independently legitimized and constitutionally powerful institution: an indirectly selected head of government (prime minister) and a popularly elected head of state (president)." However, the Indian President is not popularly elected to the extent that (s)he is not elected by popular vote. The Indian President is elected by an electoral college consisting of the elected members of both houses of the Parliament and the elected members of the State Legislative Assemblies. *See* INDIA CONST. art. 54 ("The President shall be elected by the members of an electoral college consisting of – (a) the elected members of both Houses of Parliament; and (b) the elected members of the Legislative Assemblies of the State.")

Indian conditions, a constitutionally independent President is necessary to control a political strong Prime Minister (and his Council) from converting Parliamentary democracy into becoming Parliamentary anarchy.[213]

As we have seen above, concern was expressed by several members of the Constituent Assembly that the Prime Minister and the Council of Ministers were being vested with so much authority there was a very real threat that someday all this authority would be misused by a Prime Minister to act in a completely dictatorial fashion.[214] That concern came true within less than

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[213] Ismail, *supra* note 31 at 38. ("Conventions as such can be evolved only if there had been a strong President and equally a strong Prime Minister. When a Prime Minister occupies an unchallenged position in the country's political and public life and is assertive and domineering, there will be no scope whatever for any heathy conventions being evolved in this behalf."); Trimbak K. Tope, *Should India adopt a Presidential system of Government*, (1982) 2 S.C.C. (JOURNAL) 25.Tope strongly argues for the adoption of a French style semi-presidential system of governance. He was of the view that even though, "... framers of the Indian Constitution opted for "responsible" executive and accepted the Westminster model of "parliamentary government" for the Indian Republic", in light of the 32 years of experience in working a parliamentary system it was, "... necessary to have a second look at our Constitution ...". The way forward, according to Tope, was, "... to ensure that the existing portions of the Constitution with respect to the fundamental rights, the directive principles and the fundamental duties remain intact and the dignity of the individual and the unity of the nation is also assured. The new path may lead to the ideal of a socialistic state as in the Soviet Russia or to the Presidential form of government as in France. The former would obviously be kept out of consideration for the reasons explained above. Hence the latter *viz.* the Presidential form of government has to be considered."

[214] Ismail, *supra* note 31 at 26, 38. Justice Ismail notes that the original text of the Constitution being silent on the point of the binding nature of the Aid & Advice of the Council, the intention of the framers was to leave conventions to evolve as time progressed. But the strong personality and political power of the first Prime Minister of India, Jawaharlal Nehru did not allow any constitutional conventions controlling the relationship between the Prime Minister and the President to develop. Justtice Ismail noted, "... the question of relationship between the President and the Governors on the one hand and their Council of Ministers on the other was not sought to be regulated by any express provision in the Constitution but was left to be regulated by evolving conventions and till the present day, no definite conventions have been evolved so as to constitute a precedent for the future.". Tope, *supra* note 213 at 32. Disappointed by rampant corruption in public life Tope advocated a move towards a French style semi-presidential style of government. He noted, "... India needs a government both at the Centre and in the States that would govern and would not be required to depend on the members of the legislature who are willing to sell their conscience either for power or for money."

three decades of the Constitution being adopted in 1970s when Prime Minister Indira Gandhi misused the authority vested in the Cabinet and the Prime Minister's office to "deface and defile" the Constitution.[215] A constitutionally independent President as envisaged above changes the nature of the Indian system from Westminster style Parliamentarianism, as declared in *Shamsher Singh* to a Controlled Semi-Presidential system when the President is the first constitutional check on the Cabinet exercising very limited powers of presidential review over the Cabinet. The second check is of course the Supreme Court exercising full powers of judicial review. In this way the Indian Constitution provides a new model of Semi-Presidentialism (designated here as Controlled Semi-Presidentialism) that strengthens the working of the Constitution by protecting it against unbridled Parliamentary majoritarianism.

The long exchange between Dr. Ambedkar and the President of the Constituent Assembly, Dr. Rajendra Prasad (who would later be elected as the first Indian President), as it took place on May 23rd, 1949 when the draft of article 102 (which would later become article 123) that granted the President the power to promulgate ordinances when Parliament was not in session, tends to support this view.[216] As discussed above,[217] Dr. Ambedkar insisted strongly that the President will "never be able to act independently of ministers."[218] Meanwhile the President was also correct in insisting that there is no "provision in the Draft Constitution which binds the President to act in accordance with the advice of the Ministers."[219] Some might argue that Dr.

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[215] NANI A. PALKHIWALA, OUR CONSTITUTION DEFACED AND DEFILED (1974)

[216] Ismail, *supra* note 31 at 27. ("Dr. Rajendra Prasad first as the President of the Constituent Assembly, then as the President of India, [had] repeatedly referred to this aspect of the matter.")

[217] *See* CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 138 at 215-16

[218] CONSTITUENT ASSEMBLY DEBATES, VOL. VIII, *supra* note 138 at 216

[219] *Id.* at 215. *See also* Ismail, *supra* note 31 at 28. ("Throughout Dr. Rajendra Prasad had been pointing out to the fact that there was no provision in the Constitution compelling the President to accept the advice of the Council of Ministers.")

Prasad as the first President considered himself bound by the first Prime Minister Jawaharlal Nehru's cabinet. However, this "episode" would be "irrelevant to a correct interpretation" of the Presidential Aid & Advise Clause.[220] However, we must examine this clash of ideas[221] in the light of the key holding in *D. C. Wadhwa* and its rationale. As demonstrated above, after *D. C. Wadhwa*, the Governor's power to promulgate Ordinances is subject to judicial review on the ground that re-promulgation or Ordinances is a colorable exercise of this power. On a parity of logic the President's power to promulgate Ordinances is also subject to judicial review on the same ground. *Bommai* has clearly established that the Presidential satisfaction is not entirely immune from judicial review.

Looking at all these things together, and taking our thought experiment a bit further, we ask – what is the Indian President to do when he is asked to re-promulgate an Ordinance that he knows is in violation of the law laid down by the Supreme Court in *D. C. Wadhwa*? Is the President expected to follow *Shamsher Singh*, stay quiet, and allow the commission of an act in his name that he knows to be unconstitutional? Or should the President stay true to the oath of his office and refuse to act on the advice so tendered by this Council thus providing the first check on the Council (that probably enjoys the confidence of the Parliament) and stopping it from committing an unconstitutional act? This article insists that it would not only be dangerous

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[220] SEERVAI, VOL. 2, *supra* note 35 at 2042-43, ¶ 18.29. ("The fact that Dr. Rajendra Prasad himself an eminent lawyer, but also a distinguished and lifelong worker and member of the political party in power, acquiesced in a position which his own judgment gravely questioned, cannot bind a President belonging to a different party from the party in power, nor can it have any weight in determining the meaning to be given to constitutional provisions.")

[221] *See, e.g.* Ismail, *supra* note 31 at 29. ("The basic question raised by Mr. Rajendra Prasad was that there was no provisions in the Constitution compelling the President to accept the advice of the Council of Ministers on all matters and that with reference to the nature, duties and responsibilities of certain independent functionaries created by the Constitution itself, the President was intended or expected to have an independent voice."

but also unwise and in contradiction of the Indian constitutional experience to ask the Indian President to follow *Shamsher Singh* in such situation. This article therefore contends that an alternative reading of the Indian Constitution points very strongly to a position where the Indian President is not a ceremonial or a figurehead President. Rather the Indian President is a check on the constitutional excesses that a single party majority in the Parliament can practice (something that has in fact happened in past).[222] The President provides this check by acting as a first line of constitutional defense against a Council of Ministers in New Delhi led by the Prime Minister that is inclined to advise the President to do certain things that are very clearly unconstitutional in India. Those things certainly will include, but cannot be limited to, the invocation of article 356 in violation of *Bommai*, removal of the Governor of a State in violation of *Ashok Singhal*, re-promulgation of Ordinances in violation of *D. C. Wadhwa*, and grant of pardon.

The unanimous opinion delivered by a five judge constitution bench of the Supreme Court delivered in *M. P. Special Police Establishment*[223] also supports this point. We have noted the facts of this case and the effect of the holding of this case on the view expressed in *Shamsher Singh*. At this point, we should focus attention on holding in *M. P. Special Police Establishment* that supports the theory being built here:

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[222] *See, e.g.* Ismail, *supra* note 31 at 35, 38. The views expressed by Jawaharlal Nehru in the Constituent Assembly as recorded by Justice Ismail tend to support this position. Justifying the electoral college for the election of the President, Nehru observed, "The Central Legislature may and probably will be dominated, say, by one party or group which will form the Ministry. If that group elects the President, inevitably they will tend to choose a person from their own party. He will then be even more a dummy than otherwise. The President and the Ministry will represent exactly the same thing." Clearly, Nehru did not want the President and his Council to represent the exact same thing thus advocating for a wider electoral college. If the first Prime Minister of India wanted the Indian President to "rubber-stamp" everything and anything that his Council advises him to do, then there is no reason for him to make such remarks.

[223] M. P. Special Police Establishment, *supra* note 77

> "Undoubtedly, in a manner of grant of sanction to prosecute, the Governor is **normally required to act on the aid and advice of the Council of Ministers** and not in his discretion. **However, an exception may arise** whilst considering the grant of sanction to prosecute a Chief Minister or a Minister **where as a matter of propriety the Government may have to act in his own discretion.** Similar would be the situation if the Council of Ministers disables itself or disentitles itself."[224]

As per the theory suggested in this article, the Indian President is normally required to act with the aid and advice of his Council of Ministers and is not allowed to act either independent or contrary to the advice. In other words, not only the Indian President is not allowed to act against the advice of his Council, he is also not allowed to act at all unless he has been so advised by his Council. However, in a situation where the President comes to the conclusion that the manner in which his Council has advised him to act amounts to a violation of the Presidential Oath of Office, he may refuse to act in accordance with advice of his Council. He still is not allowed to act independent of the advice but he will be completely within his constitutional authority to refuse to act. Giving the President this limited constitutional authority is necessary in order to check against the excesses of a Parliamentary majority. The President, in this way, becomes the first line of defense of against a possible unconstitutional action and by refusing to act on the ground that what he has been advised is unconstitutional can force the Council of Ministers to consider the constitutional validity of their actions.[225] By taking

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[224] *Id.* at 802. Justice Variava (for the Court) (Emphasis added)

[225] As has been quite correctly observed by the Court in M.P. Special Police Establishment, *supra* note 48, at 805, Justice Variava (for the Court), "If ... **the Governor cannot act in his own discretion there would be a complete breakdown of the rule of law** inasmuch as it would then be open for the Government

such action, the President keeps the matter out of the Supreme Court and allows the Council to deliberate on a question of constitutional importance in private and reach a constitutionally valid solution. The second line of defense against a Parliamentary majority running writ large is of course the Supreme Court, but once the matter goes to the Supreme Court, the decision of the Court not only becomes the law of the land (to be changed only by a subsequent overruling) but also shuts out of the constitutional decision making process certain political considerations that might be extremely important and even helpful in resolving the issue at hand.

The above quoted holding in *M.P. Special Police Establishment*, even though made in the context of the Governor, support a parallel position (with necessary modification, because the text of the Indian Constitution specifically allows the Governor to act "in his personal discretion" in certain cases) if taken in the context of the President. Such view is also supported by the Presidential Oath of Office (as compared to the oaths of other constitutional office holders) and by the views and concerns expressed during the drafting of the Indian Constitution (where the nature of the office of the Indian President was something on which there was no one clear opinion). It is quite possible that the Council of Ministers might not be able to or in a position to take into account all considerations when advising the President. It will happen rarely, but it could happen, and when it will happen it will mostly be for political reasons. In fact in *M. P. Special Police Establishment*, on facts, the Court had held that the Council of Ministers had failed to take into account all relevant considerations before it advised the Governor to refuse the sanction for

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to refuse sanction in spite of overwhelming material showing that a prima facie case is made out. **If, in such cases where a prime facie case is clearly made out, sanction to prosecute high functionaries is refused or withheld, democracy itself will be at stake.** It would then lead to a situation where people in power may break the law with impunity safe in the knowledge that they will not be prosecuted as the requisite sanction will not be granted." (Emphasis added)

prosecution.[226] The Council of Ministers has no tenure and continues to stay in office so long as it enjoys the confidence of the Parliament. But the President, having the security of tenure, is immune from such political considerations. So are the judges of the Supreme Court and the High Courts.

CONCLUSION

The Indian Constitution provides that the President of India is the head of the executive branch of the government. But the Indian Constitution also provides for a British Westminster style of Parliamentary government. There is no doubt that the political party that wins the majority in the legislature ends up controlling the legislative and the executive branches of the government in a Westminster style Parliamentary system of government. In such situation, a question in the context of the Indian Constitution naturally arises. Is the Indian system similar to the Westminster style and can adequately be characterized as such? Or is the Indian system similar to the American pure Presidentialism (because the executive power is vested in the Indian President)? Or is there is a division of power between the President and the Prime Minister, thus making it similar to the French semi-presidential system? Or is the Indian system a unique model in itself?

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[226] *Id.* at 805. Justice Variaya (for the Court) held that, "It is now trite that it may not be possible in a given case to prove conspiracy by direct evidence. It was for the court to arrive at the conclusion as regards commission of offence of conspiracy by direct evidence. It was for the court to arrive at the conclusion as regards commission of the offence of conspiracy upon the material placed on record of the case during trial which would include the oral testimonies of the witnesses. *Such a relevant consideration apparently was absent in the mind of the Council of Ministers when it passed an order refusing to grant sanction.* It is now well settled that refusal to take into consideration a relevant fact or acting on the basis of irrelevant and extraneous factors not germane to the purpose of arriving at the conclusion would vitiate an administrative order." (Emphasis added)

The traditional and widely accepted position is that the Indian system is similar to the British Westminster style Parliamentary system and thus can adequately be classified as such. This article challenges this view. This article argues that the traditional view is based on an interpretation of the text of the relevant provisions of the Indian Constitution by a seven judge bench of the Supreme Court of India in *Shamsher Singh*. This article re-examines the *Shamsher Singh* view in light of certain subsequent opinions of the Supreme Court of India that necessitate a revision of the *Shamsher Singh* view. Through an examination of six landmark post *Shamsher Singh* opinions, it is discovered that the interpretation of the textual provisions governing the office of the Indian President as given in *Shamsher Singh* cannot be reconciled with the post-*Shamsher Singh* position unless the *Shamsher Singh* view that equates the Indian system with British Westminster style Parliamentary system is rejected.

This article then travels back in time to the drafting era and examines the views expressed by several members of the Constituent Assembly and finds that whereas some members expressed a view that the Indian Presidency in intended to be a ceremonial presidency, certain other members were clearly of the view that this is not the case. There were several members in the Constituent Assembly who were of the view that the Indian President has to be given a limited scope of autonomy where he would not be bound by the aid & advice of his Council. The most commonly expressed concern was that an inordinate amount of powers were being concentrated in the office of the Prime Minister so as to enable the holder of the office to act in a dictatorial fashion. The original text of the Presidential Aid & Advice Clause shows that whereas the Indian President was to act in pursuance of the aid & advice as tendered by his Council, the President was not bound by such advice. It also becomes clear that the Constituent Assembly did intend to create a Parliamentary system, therefore making it clear that American style Presidentialism was not the system that the founding fathers and mothers of the Indian Constitution had in mind. The evidence from the drafting era

therefore raises questions as to the correctness of the view taken by the Supreme Court in *Shamsher Singh*.

This article also discusses the Indian experience in working its Constitution and finds that the concerns on the misuse of power by the Prime Minister that were very strongly expressed by several members during the drafting era had in fact not been out of place. The power that came to be vested in the office of the Prime Minister consequent to the traditional view that maintained that the Indian system is similar to the British Westminster style Parliamentary system, a view that was affirmed by the Court in *Shamsher Singh*, was flagrantly abused by Prime Minister Indira Gandhi. It is also the case that several key members of the Constituent Assembly as well as other legal thinkers in India had challenged the *Shamsher Singh* view long before the Court had had the opportunity to pronounce on the matter.

This article therefore questions the *Shamsher Singh* view in light of the evidence from the drafting era, experiences of working the Constitution, and key post *Shamsher Singh* opinions. On this basis, this article proposes that it is incorrect to maintain that the Indian President is bound by the aid & advice of his Council at all times. Whereas the Indian President is bound by the aid & advice of his Council generally, in the event the India President is of the opinion that the he has been advised by his Council to authorize the commission of an act that is clearly unconstitutional, the President would be within his constitutional authority to refuse to follow the advice of his Council. The President would at no time be allowed to act without or against the advice of his Council for this would amount to converting the Indian system to an American style full Presidential form of the government that was never intended by the Constituent Assembly. The only authority that the President would yield is the authority to refuse to follow the advice of his Council if the Council authorizes the commission of a clearly unconstitutional act. This system of government does not fit into any clear classifications i.e. the British,

American or the French models and is thus designated Controlled Semi-Presidentialism.

In this system, the President is not allowed to go against the will of the Council of Ministers (the executive branch) or the will of the Parliament (the legislative branch). But the system also recognizes the fact that once a political party controls of the Parliament, it is also in control of the Cabinet. In other words, the political party that controls the legislature also controls the executive. In such a situations, the chances of a tyrannical majoritarian action cannot be ruled out completely (and so much has been witnessed in India itself). The Supreme Court can act as a check against such tyrannical actions (that may come from the legislature or the executive or both). But the Supreme Court cannot be influenced by political considerations while making its decisions. Also, whatever the Supreme Court says becomes the law of the land and there might be situations when this is exactly what is necessary to be avoided (i.e. setting down a legal precedent). In such situations, the President becomes the first line of defense against a potentially unconstitutional action. The President, by exercising his power to refuse to act in accordance with the advice of his Council, forces the political majority to reconsider their action. If after discussions and considerations between majority and minority political groups (that may or may not, but advisedly should, involve constitutional scholars and lawyers), a constitutionally permissible solution is not reached and the majority persists in advising to the President the authorization of the same act as he refused before, the President may refuse the authorization if he is still convinced that he has been advised to authorize the commission of an unconstitutional act. Thus by controlling and limiting the President's involvement in the executive decision making, Controlled Semi-Presidentialism provides two checks against a legislative majority running writ large and becoming tyrannical. A parliamentary majority is thus prevented from becoming a parliamentary tyranny.

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