



THE ROLE OF GOVERNORS

REPORT

OF THE

COMMITTEE OF GOVERNORS

(1971)

PRESIDENT'S SECRETARIAT
NEW DELHI



ERRATA

1. Page 27, line 3 from the bottom, *for* the word “defferent” *read* “different”.
2. Page 32, line 18, *for* the word “as” *read* “at”.
3. Page 37, para 1, line 2 from the bottom, *delete* the word “of”.
4. Page 42, line 2 from the bottom, *for* the word “ivariably” *read* “invariably”.
5. Page 43, line 5, *for* the word “sigle” *read* “single”.
6. Page 48, line 2, *for* the word “warant” *read* “warrant”.
7. Page 54, line 2, *for* the word “advice” *read* “advise”.
8. Page 54, para 2, line 1, *for* the word “Legislature” *read* “Legislative”.
9. Page 55, line 11, *for* the word “Constition” *read* “Constitution”.



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THE REFERENCE.

The President, in his address to the Conference of Governors held in New Delhi on November 20, 1970, invited attention to some of the important functions of the Governors under the Constitution. These concerned mainly—

- (1) the choice of the Chief Minister and other members of the Council of Ministers (article 164 of the Constitution);
- (2) the summoning, prorogation and dissolution of the State Legislative Assembly (articles 172 and 174); and
- (3) the failure of constitutional machinery in a State (article 356).

A closely connected question was whether, and if so to what extent, it was possible to discern any clear principles or binding conditions in the provisions of the Constitution itself, which precisely defined the powers of the Governor in relation to the exercise of these functions. In considering this, the most important provision of the Constitution to be borne in mind was article 163 which read:

163. (1) There shall be a Council of Ministers with the Chief Minister at the head to aid and advise the Governor in the exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

(2) If any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final; and the validity of anything done by the Governor shall not be called in question on the

ground that he ought or ought not to have acted in his discretion.

(3) The question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.

The President pointed out:

Today the Constitution seems to have come under heavy strain, and there is wide discussion about the precise scope and content of some of its fundamental provisions. Divergent views are expressed and conflicting opinions freely given.

While emphasising that the Governor's business was to see that he functioned within the four corners of the Constitution and according to his best judgment and ability in the interest of the people whom he was pledged to serve, the President noted that the functioning of a Governor was also "necessarily inter-linked inextricably with the political developments in his State from time to time". In this back-ground, he desired that the relevant provisions of the Constitution should be discussed, having regard to some of the major questions that had confronted the Governors during the past twenty years. The President further observed:

A harmonious working of the Constitution true to its spirit would require evolution of healthy conventions; and if in the different States these conventions could, as far as circumstances permit, be uniformly followed, it would go a long way in inspiring confidence in the minds of the public and giving strength to the Constitution.

He suggested to the Governors' Conference that, if considered advisable, a small Committee might be formed to study the issues involved and formulate norms and conventions governing the role of Governors in relation to them.

In the deliberations of the Conference, a consensus emerged in favour of the appointment of such a Committee. While it was realised that it would be difficult to lay down specific or rigid guide-lines or define them precisely in the political situation that obtained in the country today and might develop hereafter, an examination in depth of the important issues by a Committee of this nature could, it was felt, lead to a consensus on the different issues, and a Governor, in making an assessment of each situation, could be guided by the consensus in coming to his own decision based on his own independent judgment.

The President accordingly made the following order on November 26, 1970:

Pursuant to the decision taken at the Conference of Governors held on November 20 and November 21, 1970, I hereby appoint the following Governors to be the members of the Committee to study and formulate norms and conventions governing the role of Governors under the Constitution:—

1. Shri Bhagwan Sahay, Governor of Jammu & Kashmir.
2. Dr. B. Gopala Reddi, Governor of Uttar Pradesh.
3. Shri V. Viswanathan, Governor of Kerala.
4. Shri S. S. Dhavan, Governor of West Bengal.
5. Shri Ali Yavar Jung, Governor of Maharashtra.

Shri Bhagwan Sahay will be the Chairman of the Committee.

The Committee will direct its study, in particular, to the provisions relating to (i) appointment of Council of Ministers (articles 163 and 164), (ii) summoning,

prorogation and dissolution of a Legislative Assembly (article 174), and (iii) failure of constitutional machinery in a State (article 356).

The Committee's report will be presented to the Conference of Governors.

The President appointed Shri P. N. Krishna Mani, Joint Secretary to the President, to be the Secretary of the Committee.

The Committee held four meetings, each meeting lasting two days : January 16 and 17, May 3 and 4, July 22 and 23, and September 30 and October 1, 1971.

At the first meeting, the Committee discussed its programme of work and directed the Secretary to prepare material and assemble literature for the Committee's study. The Secretary accordingly prepared and circulated to the members of the Committee a number of notes and memoranda containing discussions and factual information pertaining to the questions before it.

At the second meeting, the Committee identified and discussed the issues on which the Committee should make its report. It also came to certain tentative conclusions on the issues involved.

At the third meeting, the Committee considered and adopted the draft report. In adopting it, the Committee decided that, before submitting it finally to the President, it should be circulated to all the Governors for eliciting their comments so as to have the benefit of their views. Copies were accordingly circulated.

At the fourth and final meeting, the Committee considered the comments received from the other Governors and finalised its report for submission to the President.

The Committee wishes to acknowledge with thanks and record its appreciation of the valuable assistance it has received from its Secretary, Shri P. N. Krishna Mani, in preparing with commendable thoroughness the material and documentation relevant to its study and in assembling these in the form of a first report. His own knowledge of constitutional developments in our country and of the back-ground of our Constitution was of particular value to the Committee.

The Secretary has been competently assisted by a willing and painstaking staff to all of whom, in equal measure, this Committee wishes also to convey its thanks and appreciation.

THE REPORT

I THE CONSTITUTION

The Constitution of India has established a Federation, with clearly defined powers for the Union and the States, the residuary powers being vested in the Union. Under the Constitution, the States are in no way dependent on the Union for the exercise of their legislative and executive authority in so far as it concerns the sphere assigned to the States and does not infringe on the sphere of authority of the Union. Thus, the Council of Ministers in a State exercises its functions in complete autonomy in relation to the administration of the State. It is master of its own affairs and is competent to regulate them unimpeded by Central intervention, subject only to what is stated hereinafter.

The Constitution confers power on the Union Government to interfere with the autonomy of a State when the President may, under article 352, declare the existence of a grave emergency whereby the security of India or any part of its territory is threatened whether by war or external aggression or internal disturbance. In such event, the executive power of the Union Government will extend to giving directions to any State as to the manner in which the latter's executive power is to be exercised, and Parliament will have the power to make laws with respect to any matter within the exclusive jurisdiction of the State (List II, Seventh Schedule). The Union will also have the power to suspend or modify the provisions of articles 268 to 279 (relating to the distribution of revenues between the Union and the States). There is further provision made in article 360 to enable the President to declare by Proclamation the existence of a financial emergency, and, while such Proclamation is in force, to give directions to a State in regard to its spending power.

There is yet another important provision of the Constitution, article 356, which requires to be noted in this context. If there is a failure of the constitutional machinery in a State, the President (the Union Government) has the power to take over the administration of the State; but here parliamentary democracy in the State is substituted by parliamentary democracy at the Centre, and the Government of the State becomes the responsibility of the Union Council of Ministers answerable to Parliament.

The use and operation of these special provisions are expressly confined to conditions of emergency. In normal circumstances, a State functions as an autonomous government with a Ministry responsible to the Legislature. It is in this spirit that all the issues before us have to be approached. Ours is a written Constitution. Where the words of the Constitution are clear, we cannot go outside the language of the Constitution. Where they are not clear, and doubts or difficulties arise, we must necessarily consult such body of judicial interpretations as may exist in India or anywhere else in respect of similar Constitutions written in the English language. Finally, we must consider the Constitution as a whole and the system of government for which it makes provision. It is the spirit as well as the letter of the Constitution that must be observed and sustained.

In our study of the provisions of the Constitution, with particular reference to the powers and functions of the Governors, we have been deeply struck by the profundity of the wisdom of the Constitution-makers which inspires and runs through its provisions. As a result of the 1967 elections, a unique situation was created in our country whereby political power came to be distributed among a large number of political parties and groups. When we consider the consequential process of readjustment of political life that has evolved in the

eighteen States, with the kind of lively democracy that we have, it was inevitable that there should arise feelings of doubt and sometimes distrust. But we feel that given time and the realisation among all political parties of the need to observe certain norms of political behaviour, the difficulties which raise their head, sometimes suddenly, will find their own solution and our democracy will function smoothly and effectively.

II THE GOVERNOR

(1) THE OFFICE OF THE GOVERNOR

The Governor is appointed by the President by warrant under his hand and seal and holds office during the pleasure of the President (articles 155 and 156). Clause (3) of article 156 gives the Governor a normal term of office of five years. The manner of appointment of the Governor was a considered decision of the Constituent Assembly. An earlier decision of that Assembly to have elected Governors was reversed by it as it was felt that in a parliamentary system of government the existence of a Governor elected by the people and a Chief Minister responsible to the Legislature might lead to friction. The whole basis of our constitutional structure depends upon harmony between the Legislature and the executive. The executive powers of the State vest in the Governor, but those powers are, by law and in fact, exercised by a Council of Ministers which is responsible to the Legislature. As Head of the State he must ensure, among other things, that this responsibility is real.

Moreover, under the Constitution, just as the State is a unit of the Federation and exercises its executive powers and functions through a Council of Ministers responsible to the Legislature, and none else, the Governor, as Head of the State, has his functions laid down in the Constitution itself, and is in

no sense an agent of the President. In addition, his oath of office under article 159 requires him to "preserve, protect and defend the Constitution and the law".

Even in a situation where the Government of a State is taken over by the President under article 356, the Governor does not by virtue of anything contained in the Constitution become an agent of the President. The President assumes to himself all the powers vested in and exercised by the Governor. He may or may not, but he usually does, entrust to the Governor, by an order in writing, some or all of these powers. It is by or under such an order that the Governor acts for the President.

In the framework of the Constitution as it is conceived, there is no power vested in any authority to issue any directions to the Governor or lay down any code or rules for his guidance. The question whether an Instrument of Instructions should be issued to the Governors was considered by the Constituent Assembly; but the proposal was subsequently given up. The main reason for giving up the proposal was that, unlike the position previously obtaining, the Governor under the Constitution would be functioning as Head of the State and would not be subject to control by anyone. Dr. Ambedkar explained the position in the following words :

The purpose of the Instrument of Instructions as originally devised in the British Constitution for the Government of the colonies was to give certain directions to the heads of the States as to how they should exercise their discretionary powers that were vested in them. Now the Instrument of Instructions was effective in so far as the particular Governor or Viceroy to whom these instructions were given was subject to the authority of the Secretary of State. If in any particular matter which was of a serious

character, the Governor, for instance, persistently refused to carry out the Instrument of Instructions issued to him, it was open to the Secretary of State to remove him, and appoint another and thereby secure the effective carrying out of the Instrument of Instructions. So far as our Constitution is concerned, there is no functionary created by it who can see that the Instrument of Instructions is carried out faithfully by the Governor.

The Governor therefore has to act entirely according to the provisions of the Constitution and his oath of office in the light of the circumstances obtaining at any time when a question comes up for decision.

Even if it were permissible under the Constitution to lay down some kind of guide-lines for Governors, such a task would be beset with many difficulties. While one may discuss the various aspects of the problems which have arisen in the past, it is not easy to envisage all situations which may confront Governors in the future. In the working of the government of the State, every problem which has arisen to face a Governor had its novel features. While two situations may have some similarities they are seldom identical. It would therefore be difficult to enunciate a code which may be made automatically applicable to all future situations.

This Committee therefore does not claim to make any attempt to lay down rules for the guidance of Governors for all occasions. It has only attempted to make an examination and analysis of the various situations which have arisen in the past, or may arise in the future, and to set down its conclusions.

There may be some room for misunderstanding when a Committee like ours sets about discussing actual instances of constitutional problems which have arisen recently in some

of the States and which have been handled by our colleagues, and we considered very carefully whether in preparing our formulations we should concern ourselves with contemporary cases. These cases, it will be conceded, have great relevancy in the discussion of the issues before us, and we therefore thought that unless we analysed them, we would not be able to come to realistic conclusions or arrive at broadly acceptable principles. In doing so, we have tried to be as objective as possible, and we are sure that our colleagues will understand that, if any criticism of any action appears to be implied, it is only with a view to derive lessons therefrom and not to pass judgment on those actions, the aim being to obtain, as far as possible, a general consensus in regard to the exercise of discretion by the Governors.

The Committee recommends that a special wing may be set up in the President's Secretariat which would ascertain all the facts and circumstances relating to each situation which may arise from time to time requiring action by a Governor in the exercise of his powers and the reasons for the action taken by him in a particular situation. The facts as ascertained could then be confidentially communicated to all the other Governors, with the permission of the President. This procedure would be of great assistance to the Governors in knowing authoritatively how and why a particular Governor took a certain action and the circumstances that led to it. The information would also help to establish a degree of uniformity in the treatment of situations where they may be found to be identical or similar, and perhaps even, in some cases, certain norms of action based on accepted canons of interpretation of the Constitution.

(2) GOVERNOR'S DISCRETIONARY FUNCTIONS

Under article 163 of the Constitution, in the exercise of his functions, the Governor is to be aided and advised by a

Council of Ministers with the Chief Minister at the head, except in so far as he is by or under the Constitution required to exercise his functions or any of them "in his discretion". It is also further provided in the same article that—

- (a) if any question arises whether any matter is or is not a matter as respects which the Governor is by or under this Constitution required to act in his discretion, the decision of the Governor in his discretion shall be final, and the validity of anything done by the Governor shall not be called in question on the ground that he ought or ought not to have acted in his discretion;
- (b) the question whether any, and if so what, advice was tendered by Ministers to the Governor shall not be inquired into in any court.

The question as to what, if any, are the "discretionary" functions of the Governor under the Constitution was considered soon after it came into force in 1950. Dr. B. R. Ambedkar, who was then the Law Minister and who as Chairman of the Drafting Committee had piloted the Constitution through the Constituent Assembly, answered this question in categorical terms:

There are, in fact, only two cases mentioned in the Constitution in which a Governor can act in his discretion both of which relate to the functions of the Governor of Assam, and these will be found in paragraphs 9(2) and 18 of the Sixth Schedule to the Constitution.

It may be useful at this stage to indicate briefly the scope of the expressions "discretion", "special responsibility" and "individual judgment" in so far as they are used in the Constitution in relation to the functions of the Governor. These terms are borrowed from the Government of India Act, 1935, and embody concepts which were clearly explained at the time

that Act was made. "Discretion" relates to functions which were outside the area of ministerial responsibility and where the administration was exclusively vested in the Governor aided by his own secretarial staff. So far as the term "special responsibility" is concerned, the declaration of a special responsibility with respect to a particular matter was never intended to mean or even to suggest that, when a question relating to that matter comes up for consideration, the decision is to be that of the Governor to the exclusion of his Ministers. In no sense does it define a sphere from which the action of Ministers is excluded. It does no more than indicate a sphere of action in which it will be constitutionally proper for the Governor, after receiving ministerial advice, to signify his dissent from it and even to act in opposition to it if, in his own unfettered judgment, he is of opinion that the circumstances of the case so require. The term "individual judgment" is necessarily linked with the exercise of a special responsibility. When a Governor acts against the advice of the Council of Ministers in relation to a matter which involves special responsibility, he exercises his individual judgment as to the action to be taken.

There are also expressions used in the Constitution such as "in the opinion of the Governor" (*cf.* article 200) and "if the Governor is satisfied" (*cf.* article 213). In these cases, it is clear that the advice of the Council of Ministers is not excluded, but is, in fact, envisaged.

It may be well to make clear at this stage that the fundamental concept underlying the scheme of government under the Constitution, both at the Union and at the State levels, is the responsibility of the executive to the Legislature. This is implicit in articles 163 and 164 which provide, first, for a Council of Ministers to aid and advise the Governor in the

exercise of his functions; secondly, for advice, if any, tendered by the Ministers being beyond question in any court of law; and, thirdly, and even more important, for the Ministers to be collectively responsible to the Legislative Assembly of the State. The mechanism of government, the procedure for tendering advice and the manner of ensuring responsibility to the Assembly are left to practice and convention; they are not, and did not need to be, spelt out in the Constitution. Proper traditions have thus to be built up round the fundamental concept of responsible government, and the primary duty alike of the Governor, the Ministers and the political parties is to ensure that it is honoured, and that the right of the Legislature to expect and demand responsibility is never assailed or undermined.

Right from the commencement of the Constitution, it has been recognised that, in the choice of the Chief Minister who, under clause (1) of article 164 of the Constitution, shall be appointed by the Governor, the decision of the Governor is final and based entirely on his unfettered judgment. This view has also received judicial recognition. In *Mahabir Prasad Sharma vs. Prafulla Chandra Ghose and others* (AIR 1969 Calcutta 198), the Calcutta High Court held:

The Governor in making the appointment of the Chief Minister under article 164(1) of the Constitution acts in his sole discretion. The exercise of this discretion by the Governor cannot be called in question in writ proceedings in High Court.

There is no warrant in the Constitution itself to read into article 164(1) a condition or restriction that the Governor must act on the advice of a Council of Ministers as provided in article 163(1) in the matter of appointment of the Chief Minister. It is for him to make such enquiries as he thinks proper to

ascertain who among the members of the Legislature ought to be appointed the Chief Minister and would be in a position to enjoy the confidence of the majority in the Legislative Assembly of the State.

In regard to another provision also, namely, article 356, it is recognised that it is the function of the Governor to report to the President in case of failure of the constitutional machinery in the State independently of the advice of the Council of Ministers. To quote Dr. Ambedkar:

Such a report by a Governor can hardly be made on the advice of his Ministers, for, if the Governor is to act on their advice in the matter of suspension of the operation of the Constitution, the Ministers will never advise him to take such an action which would inevitably put an end to their administration.

In a memorandum (May 30, 1947) prepared for the use of the Union Constitution Committee of the Constituent Assembly, Shri B. N. Rau had included a provision almost identical to present article 163(1) of the Constitution. His draft read as follows :

There shall be a Council of Ministers to aid and advise the Governor in the exercise of his functions except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion.

He explained the purport of this provision in the following note:

For the most part, the Governor will act on advice, but there are certain functions which even a responsible Head has to exercise in his discretion, *e.g.*, the choice of the Prime Minister, the dissolution of the Legislature (in certain events), and so on. In present

circumstances, similar discretion may have to be vested in the Governor in the matter of the protection of minorities and the maintenance of law and order. Of course, it is possible that if in any of these "discretionary" matters, the Governor were to act against the advice of the Ministry, the Ministry might resign and the Governor might not be able to find an alternative Ministry. In such cases, the Governor would normally accept the advice of the Ministry in preference to his own judgment, but in an extreme case, he might dissolve the Legislature. If the new Legislature endorses his view of the situation and returns a different party to power, his action will have justified itself. If, however, it returns the same party to power, the Governor will then have no option except to act in accordance with the advice of his former Ministers. The "discretionary" power will, in such cases, have at least the effect of bringing the issue before the electorate.

In the Draft Constitution as prepared by the Drafting Committee, clear provision had been proposed for conferring on the Governor discretionary functions in relation to certain specific matters. These were:

- (1) appointment and dismissal of his Ministers (article 144(6)¹);
- (2) summoning of the Legislature and dissolution of the Legislative Assembly (article 153²);
- (3) power to return to the Legislature for reconsideration a Bill submitted to him for his assent (article 175³);

1. *cf.* present article 164.

2. *cf.* present article 174.

3. *cf.* present article 200.

- (4) issue of a Proclamation in an emergency superseding his Ministers and assuming to himself executive functions (article 188¹);
- (5) appointment of the Provincial Auditor-in-Chief (article 210);
- (6) appointment of the Chairman and members of the Public Service Commission (article 285²).

There were, in addition, the discretionary powers conferred on the Governor of Assam earlier mentioned

As the discussion in the Constituent Assembly progressed, it became clear that the Constitution was going to be based entirely on the parliamentary system of government, *i.e.*, responsibility of the Council of Ministers to the Legislative Assembly in regard to executive functions. The Drafting Committee accordingly proposed amendments deleting the requirement in the provisions mentioned above that the Governor would act in his discretion, except in the case of the Governor of Assam.

It is relevant to recall here that, under the Government of India Act, 1935, as adapted under the Indian Independence Act, 1947, the Governor had no functions in which he was required to act in his discretion. Section 50 of the Act of 1935, as adapted, read as follows:

50. There shall be a Council of Ministers to aid and advise the Governor in the exercise of his functions.

Prior to this, however, the Governors had certain special powers. Indeed, these were considered to be a very unpopular feature of the Government of India Act, 1935, as they constituted a substantial diminution of ministerial responsibility and a corresponding encroachment on the powers of the Legislature.

1. *cf.* present article 356.

2. *cf.* present article 316.

A Governor in this scheme acted in subordination to the Governor-General in the exercise of his discretionary functions, and the Governor-General himself functioned in subordination to the Secretary of State for India. Thus, the ultimate responsibility for these matters rested with the British Government which was responsible to the British Parliament.

Mention has already been made of the discretionary functions vested in the Governor of Assam. The power of that Governor to act in his discretion has been stated in specific terms in the Constitution in paragraphs 9(2) and 18 of the Sixth Schedule to the Constitution. Paragraph 9(2) refers to a limited matter of a possible dispute with regard to the share of royalties to be handed over to a District Council of one of the autonomous Districts of Assam. Paragraph 18 refers to the Governor's discretionary powers in respect of the administration of the areas specified in Part B of the Sixth Schedule of the Constitution, viz., the region comprised within the North East Frontier administration which is not under the jurisdiction of the Ministry in Assam. In the administration of that region, the Governor has to act as the agent of the President, and act further in his own discretion without seeking the advice of his Council of Ministers.

In article 239 it has been provided that a Governor of a State can be appointed as the administrator of an adjoining Union Territory; and that, in the administration of the Union Territory, the Governor does not have to act on the advice of the Council of Ministers of the State of which he is the Governor because the Council of Ministers of the State in any case is not concerned with the administration of the Union Territory.

Later, in two amendments of the Constitution, in articles 371 and 371-A, provision has been made for placing special responsibility on a Governor for certain purposes. Under article 371, the President may, by order, with respect to the

State of Andhra Pradesh, make provision for any special responsibility of the Governor in order to secure the proper functioning of the regional committees of the Legislative Assembly of the State. The President may, by order, also under the same article, with respect to the State of Maharashtra or Gujarat, provide for any special responsibility of the Governor for the equitable administration of certain special areas, namely, Vidarbha and Marathwada in Maharashtra, and Saurashtra and Kutch in Gujarat. In article 371-A, a special responsibility has been placed on the Governor of Nagaland for certain specific purposes, and, in the discharge of his functions in relation thereto, he shall, after consulting his Council of Ministers, exercise his individual judgment as to the action to be taken. If any question arises whether any matter is or is not one with respect to which the Governor is required to act in his individual judgment, the decision of the Governor in his discretion shall be final:

The special occasions when a Governor has normally to act without seeking the advice of his Council of Ministers, or to exercise his individual judgment after having consulted it, have thus been incorporated in the articles mentioned above. The question then arises why in article 163 provision has been made that though normally the Governor shall act on the advice of his Council of Ministers he may, if he considers any matter calling for the exercise of his discretion, act in his own discretion. This article has been phrased in rather wide and general terms. The only meaning which can be attributed to this article is that in acting in the exercise of his powers a Governor may find that action under a particular article in the Constitution by necessary implication requires him not necessarily to act on the advice of his Council of Ministers but on his own. As already stated, the most important of these articles under which he is to act without consulting the Council of Ministers are those

relating to the choice of the Chief Minister and when reporting to the President under article 356 on the breakdown of the working of the Constitution in the State. These instances, however, are not exhaustive. Thus, even though in normal conditions the exercise of the Governor's powers should be on the advice of the Council of Ministers, occasions may arise when the Governor may find that, in order to be faithful to the Constitution and the law and his oath of office, he has to take a particular decision independently. It is however realised that, in the scheme of our Constitution, such occasions will be extremely rare.

Even in the sphere where the Governor is bound to act on the advice of his Council of Ministers, it does not necessarily mean the immediate and automatic acceptance by him of such advice. In any relationship between the Governor and his Council of Ministers, the process of mutual discussion is implicit, and the Governor will not be committing any impropriety if he states all his objections to any proposed course of action and asks the Ministry to reconsider the matter. In the last resort he is bound to accept its final advice, but he has the duty, whenever necessary, to advise the Ministry as to what he considers to be the right course of action, to warn the Ministry whenever he thinks that the Ministry is taking an erroneous step, and to suggest to it to reconsider the proposed course of action. In the process of advice and consent, there is ample room for exchange of views between the Governor and the Council of Ministers even though he is bound to accept its advice.

In considering the duties of a Governor, particularly in his relations with his Council of Ministers and the need for both to fulfil their constitutional obligations, it is well to remember the duty placed on the Chief Minister under article 167—

- (a) to communicate to the Governor all decisions of the Council of Ministers relating to the administration of the affairs of the State and proposals for legislation;

- (b) to furnish such information relating to the administration of the affairs of the State and proposals for legislation as the Governor may call for; and
- (c) if the Governor so requires, to submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a Minister but which has not been considered by the Council.

Furnishing of the minutes of all meetings of the Council of Ministers and the submission of all Bills to the Governor for his assent meet the requirements of (a) substantially. Both are equally a constitutional obligation, and it is presumed that the practice prevails in all States of the minutes of all meetings of the Council of Ministers being furnished regularly to the Governor. As to (b), the initiative rests with the Governor to call for further information relating to the administration of the affairs of the State and proposals for legislation, and the duty devolves on the Chief Minister to comply with all such requests. It is the provision under (c), however, that presents certain difficulties. For the Governor to require that a matter on which a decision has been taken by a Minister, but which has not been considered by the Council, should be so considered, implies that he must know what decisions have been taken by a Minister. The field of competence of a Minister, particularly in a homogeneous Cabinet, is extensive enough to render this provision impracticable if it were to be interpreted narrowly, nor would any Governor, wish to act upon it in a manner which might result in interference with the day to day administration. Important decision would, it may be expected, be taken by the Council of Ministers in any event, or by the Minister with the approval of the Chief Minister. The area for any such suggestion would thus be very small indeed, but it may involve an issue of principle or provoke a controversy harmful to the Government or affect Centre-State relations, and the Governor

might think it advisable and in the best interests of the State, or the Government itself, that the decision should be taken by the Council of Ministers. Where the Ministers represent different parties or groups, such a suggestion may, in fact, be helpful to the Chief Minister if it comes from the Governor. Seldom, if ever, should it be required that a decision of a Minister should be so considered by the Council of Ministers without the fullest consultation first with the Chief Minister.

Much depends in this, as in all matters governing the relations between the Governor and his Ministers, on both of them understanding equally the spirit as well as the letter of the Constitution, their obligations under it, and their determination to ensure its proper working by cooperation with each other in the performance of their respective responsibilities. Frequent contacts and frank exchange of information and views between the Governor and the Chief Minister are of the essence of this relationship. A Governor thus kept informed can, among other things, be the best interpreter of the actions of his Government, specially as he is expected to be unbiased from the party point of view. He has, very often, to make public utterances on formal occasions connected with national or State activities, and it would at least preclude the possibility of expression of divergent views if, in making such utterances, the Head of the State were to be kept informed of all important decisions and of the way of thinking of his Council of Ministers. What better source of information in that regard could be open to the Governor than his own Chief Minister? On the other hand, the Governor could and should be the best friend and adviser of his Chief Minister and his colleagues.

Reference may be made here to the Governor's duty to keep the President informed, periodically and regularly, on matters connected with the affairs of the State, and the practice prevails of periodic reports to the President of which copies are

sent to the Chief Minister. Having regard to the nature of our federal Constitution and the interest of the Union Government in the security of India, there may be occasions for the Governor, aside from his periodical reports, to inform the President particularly of any serious internal disturbances and, more especially in certain States, of the existence or otherwise of a possible danger of external aggression, both in the context of all India. For the proper discharge of this duty, the Governor must have authentic information from his own Government and from the Union Government. Even otherwise, Centre-State relations and directives from the Centre governing important aspects of these, as well as the reactions of the State, are spheres of legitimate interest for a Governor, as lack of knowledge of what passes between the Centre and the State could only tend to abort his usefulness. It is essential for this purpose that the rules of business of the State should make provision for such information to be supplied to the Governor and for the Union Government itself to keep the Governor duly informed. How is the Governor to ask for a particular correspondence or directive without knowing that it exists ?

We have stressed in this report the need for the realisation, on the part equally of the Governor and of the political parties with which he has to deal, that the Constitution, if properly observed by both, makes sufficient provision for dealing with all situations and for regulating the good and stable government of the State in accordance with the requirements of responsible parliamentary government. The responsibility for ensuring the latter rests equally on the Governor and his Ministers, not to speak of the parties to which they belong, and occasions for the intervention of the Governor, as prescribed by the Constitution, would obviously not arise where the political parties and their leaders themselves act according to the norms of parliamentary government. The development of a consensus on such norms

is, therefore, as necessary for them as for the Governors themselves.

III POLITICAL DEFECTIONS AND THEIR IMPACT

In considering the issues before us, reference may be made at the outset to a most disturbing feature in the political life of our country, especially since the 1967 general elections. To quote from the President's address to the Governors' Conference on November 20, 1970:

In some States, I regret to say, political parties, due to internal squabbles and personal jealousies, have contributed to instability in government. One of the major causes for this development, especially after the 1967 elections, has been the large scale defections that have taken place in the ranks of these parties. According to a recent survey, during 1967-70, a total of about 800 defections occurred, out of whom 85 per cent crossed the floor affecting the majority of government. Nearly two-thirds of these defections, it is further noted, involved losses to nationally recognised parties thereby impeding the proper development of a healthy and viable party system. A good number of these defections take place because of the promise of reward of office or other official patronage—a circumstance which directly lends itself to indiscipline and political corruption. A person who changes his party affiliation in this manner, after having been elected on the basis of a definite party mandate, is no longer entitled to represent his constituents except after seeking a fresh mandate.

Frequent defections from the political parties for reasons other than of principle have not merely led to instability of governments, but have disrupted and given a distorted

view of the political life of the country. According to a recent survey, defections, whether from among party members or by independents defecting after joining political parties, tended to affect the majority enjoyed by the Government. Defections were found to be more common during periods when the Assembly was in session. Group rivalries in a party, sometimes leading to the emergence of a rival group or faction, contributed, in the main, to defections. The bulk of the defections, it appeared, were not the marginal cases of change of loyalties but consisted of flows in and out of parties essentially directed to affect the working strength of the majority (example: the case of the Congress(O) Ministry in Gujarat earlier this year). Another important feature of the defections has been the existence of a significant relationship between defections and rewards of office.

In the survey referred to earlier, the names of 768 defectors out of a total of 1,240 defections during the period March 1967 to August 1970 were scrutinised. It was found that 155 of these defectors had been rewarded with the office of Cabinet Minister or Minister of State or Deputy Minister or Parliamentary Secretary. Thus, one in every five defectors during the period had been rewarded with public office subsequent to his defection. Out of 155 offices distributed to defectors, as many as 84 were of Cabinet rank. It also appeared that, apart from the reward of office, defections were being secured by other means not too honourable.

Political defections place in the hands of an unscrupulous person a weapon by which he himself or the group which he represents may inveigle members belonging to other groups to defect to his side for consideration of office or other patronage so that he either by himself or the group which he represents may stake a claim for the office of Chief Minister and leader of the government. How is the Governor to satisfy himself in such

a fluctuating situation that any person will be able to command a stable majority in the Legislature and provide an effective government? Can any government formed in such circumstances truly meet the requirement of collective responsibility which is the basis of a parliamentary system? Though a straight answer to this question may not be easy to find, as each situation will have to be judged on the circumstances surrounding it, it cannot be denied that this tendency will prove fatal to the functioning of our democracy. The services will be completely demoralised and the administration torn apart. It may be considered whether in situations like this the proper course would not be a dissolution of the Legislature and an appeal to the real political sovereign, namely, the electorate, as was done in Mysore. The recent Gujarat example, on the other hand, is a case where political defections took place in the expectation that a party opposed to the ruling party might form a government; but when it became known that the expectation was not going to materialise, some defectors went back to the original fold, and the same Chief Minister, who had tendered the resignation of his Council of Ministers earlier, again formed the government though with a reduced majority. This Government also proved to be short-lived, and defections continued to afflict the political life of the State and the Governor was left with no option but to report failure of the constitutional machinery. In recommending imposition of President's rule and dissolution of the State Legislature, the Governor made the following observation:

There have been indiscriminate defections and redefections in the past and there is no guarantee that such a process will not be repeated even in future, whoever forms the Ministry. The conditions prevailing in this State at this juncture are such that any Party agreeing to form a Ministry will have a tenuous majority and

will not be able to provide a reasonably stable government to the State.

In Uttar Pradesh, the *Samyukta Vidhayak Dal* Government, headed by Shri T. N. Singh (Congress-O), was voted out of office due to defections on the part of some members belonging to some of the partners in the *Dal*, and a new government headed by Shri Kamalapati Tripathi (Congress-R) was formed, the number of members of the Congress(R) party having gone up as a result of defections from other parties to Congress(R). Yet another instance of a Government falling due to defections was the S. V. D. Government headed by Shri Karpuri Thakur in Bihar. The new Government headed by Shri Bhola Paswan Shastri was formed by a combination of parties and some independents joining together under the name of *Progressive Vidhayak Dal*. In Punjab, the downfall of the Badal Ministry in June last was brought about by a split in the ruling Akali Party.

The dissatisfaction with the practice of defections has led occasionally to demands for legislation against permitting a member of the Legislature to change his party and cross the floor after his election. It appears to us that such legislation would offend the provisions of articles 19(1)(c), 102 and 191 of the Constitution, and would interfere with the right of dissent. It would not permit genuine changes of conviction or dissatisfaction with the party or its leadership, for example, in cases where promises or programmes remain unfulfilled. There is room, on the other hand, for insisting, whether by law or by convention, that a member of the Legislature thus changing his party, for whatever reason, should go to his constituency, which had elected him on a certain party ticket and, therefore, on the basis of that party's programme, and seek fresh election and the approval of the electorate. This, admittedly, is different from curbing the right of dissent or change, and is in essence an extension of the exercise of responsibility which is at

the root of our Constitution. Morally too, this would be the right course to adopt, and may certainly restrict defections prompted only by reasons of self-interest or pursuit of power. Legislation to this end may, however, present certain difficulties, and, even though not intended, may attract the provisions of the articles quoted above. It may also have the indirect effect of freezing the strength of parties and not permitting the gradual readjustments which may eventually result in the elimination of mushroom parties and splinter groups. On the whole, we would favour the development of healthy conventions among the political parties and leave that development to the impact of an awakened public opinion.

IV THE COUNCIL OF MINISTERS

(1) THE CHOICE OF CHIEF MINISTER

Clause (1) of article 164 of the Constitution provides that the Chief Minister shall be appointed by the Governor. In a parliamentary system of government like the one we have, the principal consideration governing the choice of the Chief Minister is that he shall be a person most likely to command a stable majority in the Legislative Assembly of the State. It is clear that it is the Governor alone who has to take a decision as to which person is in a position to command a majority in the Legislative Assembly and to invite him to form the government. (See, in this connection, the Calcutta High Court's Judgment in *Mahabir Prasad Sharma v. Prafulla Chandra Ghose* quoted at pp. 14-15 *ante*.)

Where a single party commands a majority, the Governor is bound to call upon its leader to form the government. The question of making a choice by the Governor arises when, in a general election, no single party obtains a majority of seats in the Legislative Assembly. The party system is the very basis for the successful functioning of parliamentary democracy.

How is a Governor to satisfy himself which among the parties elected—when no party obtains a majority of seats—will be in a position to provide the leadership for a stable government either by itself or in combination with others ?

Must the leader of the largest single party in the Legislative Assembly be called upon to form a government by the Governor even without satisfying himself that that leader will be able to command a majority in the Legislative Assembly ? The answer to this question is simple. The test for the choice of a Chief Minister is not based necessarily on the strength of a party except when it has a majority of seats in the Assembly. The leader of the largest single party in the Legislative Assembly may be invited to head a government if he is able to satisfy the Governor that, in combination with other parties or with the support of other members in the Assembly, he is in a position to command a majority in the Legislature. He has, however, no absolute right as leader of the largest single party or group to claim that he should be entrusted with the task of forming a government to the exclusion of all others. The relevant test is not the size of a party but its ability to command the support of the majority in the Legislature. It may be that a party, even though leading in relative strength in a Legislature, may not be able to obtain the support of other members. In contrast, a numerically smaller party may command majority support with the help of other parties or groups. The Governor has thus first and essentially to satisfy himself that the person whom he invites to form the government commands majority support in the Legislature. Obviously, he must satisfy himself only on the basis of an informed and objective appraisal of the prevailing situation in the Assembly. For that purpose, nothing prevents him from consulting the leaders of different parties or groups; in fact, in most circumstances, it may be necessary for him to do so. The latest two examples where the leader of the largest

party was not invited to form the government are Orissā and West Bengal after the mid-term elections in 1971.

If prior to a general election some parties combine on an agreed programme or an electoral understanding that if such a combination gets a majority they will form the government, and if such combination does secure a majority, is not the Governor bound to call upon the commonly chosen leader of the combination to form the government? Here the answer is easy, because the electorate in returning such a combination to the Legislature in a majority had already prior knowledge that it would be called upon to form the government. Therefore, the Governor, in inviting the leader of such a combination, would be acting in accordance with the wishes of the electorate (example: the present United Front Ministry in Kerala).

A coalition of two or three political parties with broadly identifiable common programmes may find it possible to choose a leader acceptable to the different coalition partners. But the situation we are confronted with in some States is different. We witness an assortment of parties with widely divergent programmes and policies—wherever such programmes and policies are publicly announced—combining themselves to form what are now called *Samyukta Vidhayak Dals* (United Legislature Parties), the only agreement among them being the agreement to get into government. The two basic conditions which would ensure a stable government by such combinations are, first, that the different parties should enter the combination as a unit, and, secondly, that they should remain faithful to the combination. Experience has shown that neither of these two conditions has existed in the States where we have had S. V. D. Governments. This is because some of the parties in the combination contained dissentients who would not follow their leader or his programme, or who sought their own advancement

by the overthrow of one Ministry, hoping that the formation of a new one would find them more favourably placed to command office. We have witnessed recently the uncertainties to which the Government headed by Shri T. N. Singh in U. P. was subjected, and how it could not remain in office for long. Similarly, in Bihar, the S.V.D. Ministry headed by Shri Karpuri Thakur made additions to the Council of Ministers whenever there was a threat to its continuance in office.

It requires to be mentioned that the leader of the party which is in a minority in the Legislative Assembly may also be invited to form a government without that party necessarily entering into a combination with other parties provided the Governor is satisfied that such a minority party leader will be able to command the support of other parties in the Assembly for its policies. To quote Shri B. N. Rau (*INDIA'S CONSTITUTION IN THE MAKING—p. 207*):

Minority governments are more common than is commonly supposed. They are undoubtedly weaker than majority governments. But they are not so weak that they cannot govern. And a government without a majority is not entirely disarmed. It still possesses the weapon of dissolution.

After the split in the Congress Party towards the end of 1969, Shrimati Indira Gandhi's Government, though numerically in a minority in the Lok Sabha, remained in power with the parliamentary support of some other parties for its policies. There were at least five different occasions when her Government was challenged by Opposition parties in the Lok Sabha on different important issues (including a no-confidence motion). On all the five occasions the Opposition motions were defeated with wide margins.

There are two other closely related questions in considering the issue relating to the choice of a Chief Minister :

- (1) In a case where no single party has obtained a majority in an election to the Legislature, and where there is no united front (or combination of parties) formed prior to the election as such united front, and if, after the elections some parties or groups combine for the purpose of forming a government, how is the Governor to make his choice of a Chief Minister ? Is the Governor bound to call upon the person who, by a common understanding reached among the party or group leaders forming such combination, is named the leader of the combination ? It has to be remembered that, in a party system, the leader is invariably chosen by election from among the members of the party. When a combination of parties wants to choose a leader, will it not be proper to insist that such leader should also be elected as a common meeting of the members of all the parties and groups forming the combination ? Taking the U.P. example again, Shri T. N. Singh's name was proposed to the Governor as the leader of the *Samyukta Vidhayak Dal* through a communication signed by the leaders of the different parties represented in the *Dal*. In fact, almost immediately after the communication was sent, some members, at least of one party (the S. S. P.), publicly disowned Shri T. N. Singh's leadership. Can the Governor's satisfaction be based merely on a communication signed by leaders of the different parties in a combination ? Has the Governor not the duty to satisfy himself that the leader of a combination has the support of all the members forming the combination ? The procedure of electing the leader at a meeting of all the members of the combination will avoid the

necessity of the Governor checking up with different leaders or individuals as to their allegiance to the leader. Majority support in a Legislature should not be converted into a mere game of manipulation in numbers. Such support, if it has to be real, must be spontaneously and publicly expressed through a process of election. Today, Governors often find themselves in the unenviable position of getting conflicting lists with names overlapping, and having to send for individual members to ascertain their loyalty or allegiance to a particular leader. This has been one of the most distressing features of our political life in some of the States. The Rajasthan example in 1967, of members parading before the Governor and later before the President at Delhi, has done no good to the image of our parliamentary system. It is worth stating that even an unquestioned leader of the standing of Shri Jawaharlal Nehru was elected by the Congress Parliamentary Party to its leadership every time after each general election. If a convention is adopted by which the leader of a coalition (or S. V. D.), like the leader of any political party, is chosen by election at a meeting of all members of the different parties forming the coalition, the task of the Governor will be rendered easier.

- (2) How far is it consistent with the spirit of the parliamentary system to invite a person, who is not elected to the Legislature, to form a government? A connected question is, how far is it right to invite a nominated member to be the Chief Minister and to form a government? In this connection, the following observation of John P. Mackintosh (*THE GOVERNMENT AND POLITICS OF BRITAIN*)

regarding the choice of Prime Minister in the United Kingdom is interesting :

The nomination of a party leader as Prime Minister or, if the party is out of office, as a potential Prime Minister mainly depends on two factors: the man's position inside the party and his capacity to add to the party's electoral appeal.

Mackintosh further observes :

The party system is the life blood of the body politic. The mass electorate is primarily voting for one or other party *and its leadership* in the hope that those whom they prefer will form the Government. M.Ps know that they were not elected because of their own qualities or views but because they bore a party label and that their chief task in the eyes of the voters is to keep their leadership in power. Besides this, nothing else matters.

When an election is held, it is the normal expectation that one of the elected members, who is the leader of a party represented in the Legislature, is chosen as Chief Minister. The choice becomes difficult when no single party obtains a majority, and two or more parties or groups combine to keep in office a government based on a coalition. The Constitution permits a person who is not a member of the Legislature to be appointed Minister provided he gets elected to the Legislature within six months of his appointment as Minister. The Chief Minister, however, occupies a more conspicuous and important position, and the convention needs to be developed that an elected member should be chosen as leader of the group or groups claiming to form the government. In a parliamentary system the executive is ultimately responsible to the electorate through its representatives in the Legislature. No such responsibility is owed, nor

should, therefore, be entrusted to a person as leader who is not an elected member of the Legislature. If, in very exceptional circumstances, a person, who is not already elected, is chosen as leader and is invited to be Chief Minister, he must stand for election within the shortest possible time, and, if not elected, should quit office forthwith. Immediate resignation on failure to secure election applies equally to the other Ministers. (In 1964, Mr. Gordon Walker, who had been appointed to a Cabinet post, resigned the day following his defeat in a bye-election.)

Inviting a nominated member to form a Government is open to the same criticism of being against the spirit of the parliamentary system. A nominated member has no electoral support and, therefore, no mandate from the electorate. The provision for nomination of 12 members to the Council of States at the Centre and the provision for nominating a certain number of members to a Legislative Council in a State are expressly intended to secure the services of persons having special knowledge or practical experience of such matters as literature, science, art, co-operative movement (in the States) and social service. They are nominated because they are considered to be eminent and experienced men whose knowledge in their special fields may be available to the Legislature. In making this provision, the Constituent Assembly considered that such persons might not care to stand for election, but that, nevertheless, their services would be available to the Legislature as specialists.

The first case of a nominated member being invited to head a Government was in undivided Madras in 1952. Finding it difficult to form a stable government after the first general elections, the Governor of the State nominated Shri C. Rajagopalachari to the Legislative Council. Thereafter, the Congress Party in the Assembly elected him as its leader with a view to his becoming Chief Minister. There was also an

understanding that Shri Rajagopalachari would not be asked to face a contested election for the Assembly but would function as Chief Minister from the Upper House.

The case of Shri B. P. Mandal in Bihar was another example of a person being nominated to the Legislative Council with a view to becoming Chief Minister. In January 1968, Shri Mandal got one of his nominees of the *Soshit Dal* appointed as Chief Minister for a short period (actually four days) so that he might recommend Shri Mandal's nomination to the Legislative Council. This having been done, the "nominee" of Shri Mandal resigned his office and enabled the latter to become Chief Minister. (Shri Mandal had been a Minister in the previous United Front Ministry for nearly six months without being a member of either House.) Though the nomination of Shri Rajagopalachari enabled Madras to have a stable government, the manner in which Shri Mandal was chosen Chief Minister did no credit to our parliamentary system. Shri Mandal's *Soshit Dal* Government lasted only about seven weeks.

We are of the view that to nominate a person to the Legislature in order to make him Chief Minister and to lead the Government, is contrary to the basic concept of parliamentary government.

A Governor should be a close observer of the political developments in his State and should keep himself fully informed about the political situation at any given time. He has several means of doing so and of knowing what is happening in the State. In the light of his full knowledge of the situation, he should invite the person who commands a clear majority in the Legislative Assembly to be Chief Minister and form the Ministry.

2) THE CHOICE OF OTHER MINISTERS

Under clause (1) of article 164, the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, subject to the proviso that, in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may, in addition, be in charge of the welfare of the Scheduled Castes and backward classes or any other work. Here, the provision in the Constitution is unambiguous and mandatory. In appointing the other Ministers, the Governor has no choice except to act on the advice of the Chief Minister. The problem that has arisen in this connection is the manner in which the Council of Ministers is constituted in the States where the *Samyukta Vidhayak Dals* have been inducted into office. These *Dals*, or other similar combinations, as has been stated earlier, are not formed on the basis of any common programme or electoral alliance prior to the elections. They come into being after the elections solely for the purpose of forming a government, often without agreement even on a minimum common programme. In such a situation, conflicting interests of the different groups forming the *Dal* have to be satisfied, and special care has also to be taken to see that the *Dal* does not break up due to individual ambitions for office not being satisfied.

There have been cases of long intervals between the swearing-in of a Chief Minister and the appointment of the other Ministers. The provision in clause (1) of article 163, that there shall be a Council of Ministers, clearly implies that the Governor has to instal a Council of Ministers. There should, therefore, be no undue delay between the Chief Minister's acceptance of office and his tendering of advice to the Governor in regard to the appointment of the other Ministers and the allocation of portfolios to them.

There have been instances in which, on the formation of a new government, the Chief Minister alone has been sworn in pending the appointment of other Ministers. This practice is clearly unconstitutional because article 163 (1) speaks of a Council of Ministers, and the Chief Minister by himself, without even a single other Minister, cannot be said to constitute a Council of Ministers.

V. COUNCIL OF MINISTERS TO HOLD OFFICE DURING GOVERNOR'S PLEASURE.

Clause (1) of article 164 lays down that the Chief Minister and other Ministers shall hold office during the pleasure of the Governor. The question, what is the precise connotation of the expression "during the pleasure of the Governor", has often been raised. The Calcutta High Court has answered this question as follows:

Article 164 (1) provides that the Ministers shall hold office during the pleasure of the Governor. This exercise of pleasure by the Governor, however, has not been fettered by any condition or restriction. The withdrawal of the pleasure by the Governor is a matter entirely in the discretion of the Governor. The provision in clause (2) of article 164, that the Ministers shall be collectively responsible to the Legislative Assembly of the State, does not in any manner fetter or restrict the Governor's power to withdraw the pleasure during which the Ministers hold office. Collective responsibility contemplated by clause (2) of article 164 means that the Council of Ministers is answerable to the Legislative Assembly of the State. It follows that a majority of the members of the Legislative Assembly can at any time express its want of confidence in the Council of Ministers. But that is as far as the Legislative Assembly can go. The Constitu-

tion has not conferred any power on the Legislative Assembly of the State to dismiss or remove from office the Council of Ministers. If a Council of Ministers refuses to vacate the office of Ministers, even after a motion of no-confidence has been passed against it in the Legislative Assembly of the State, it will then be for the Governor to withdraw the pleasure during which the Council of Ministers holds office. The power to appoint the Chief Minister, and the Council of Ministers on the advice of the Chief Minister, and the power to remove the Ministers from office, by withdrawing the pleasure contemplated by article 164 (1), have been conferred upon the Governor of the State exclusively.

The right of the Governor to withdraw the pleasure, during which the Ministers hold office, is absolute and unrestricted. Furthermore, having regard to the provisions in clause (2) of article 163, the exercise of the discretion by the Governor in withdrawing the pleasure cannot be called in question in this (writ) proceeding. (*Mahabir Prasad Sharma v. Prafulla Chandra Ghose and Others* (AIR 1969 Calcutta 198).

Under what circumstances may a Governor then withdraw his pleasure from his Council of Ministers? It is interesting to recall in this context that two members of the Constituent Assembly, Shri Mohd. Tahir and Shri Mohammed Ismail Sahib, wanted specific provision to be made in the Constitution to the effect that Ministers could remain in office only so long as they retained the confidence of the Legislative Assembly. Shri Mohd. Tahir said:

In certain cases, it may happen that there may be some sort of a tug of war as between the pleasure of the Governor and the confidence of the members of the

Legislative Assembly. It may happen that the members of the Legislative Assembly may not have confidence in the Ministers, but at the same time, through long association with the Governor, the Ministers may enjoy the pleasure of the Governor quite all right. I want that the hand of the Governor should be made stronger so that if he finds that over and above the question of his pleasure, if the Ministers have not got the confidence of the Assembly, the Ministry should be dissolved.

Rejecting these amendments, Dr. Ambedkar replied:

The first point raised in the debate is that instead of the provision that the Ministers shall hold office during pleasure it is desired that provision should be made that they shall hold office while they have the confidence of the majority of the House. Now I have no doubt about it that it is the intention of this Constitution that the Ministry shall hold office during such time as it holds the confidence of the majority. It is on that principle that the Constitution will work. The reason why we have not so expressly stated it is because it has not been stated in that fashion or in those terms in any of the Constitutions which lay down a parliamentary system of government. "During pleasure" is always understood to mean that the "pleasure" shall not continue notwithstanding the fact that the Ministry has lost the confidence of the majority. The moment the Ministry has lost the confidence of the majority, it is presumed that the President (or Governor) will exercise his "pleasure" in dismissing the Ministry and, therefore, it is unnecessary to differ from what I may say the stereotyped phraseology which is used in all responsible governments.

The question how one is to know that the House has withdrawn its confidence from a Ministry has been dealt with in Dicey's book *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*:

The rule that a Ministry who have lost the confidence of the House of Commons should retire from office is plain enough, and any permanent neglect of the spirit of this rule would be absolutely inconsistent with Parliamentary government, and would finally involve the Minister who broke the rule in acts of undoubted illegality. But when you come to inquire what are the signs by which you are to know that the House has withdrawn its confidence from a Ministry—whether, for example, the defeat of an important Ministerial measure or the smallness of a Ministerial majority is a certain proof that a Ministry ought to retire—you ask a question which admits of no absolute reply. All that can be said is, that a Cabinet ought not to continue in power (subject, of course, to the one exception on which I have before dwelt) after the expression by the House of Commons of a wish for the Cabinet's retirement. Of course, therefore, a Minister or a Ministry must resign if the House passes a vote of want of confidence. There are, however, a hundred signs of Parliamentary disapproval which, according to circumstances, either may or may not be a sufficient notice that a Minister ought to give up office. The essential thing is that the Ministry should obey the House as representing the nation. But the question whether the House of Commons has or has not indirectly intimated its will that a Cabinet should give up office is not a matter as to which any definite principle can be laid down. The difficulty which now exists, in settling the point at which a Premier and his colleagues are bound to hold that they have lost

the confidence of the House, is exactly analogous to the difficulty which often perplexed statesmen of the last century, of determining the point at which a Minister was bound to hold he had lost the then essential confidence of the King. The ridiculous efforts of the Duke of Newcastle to remain at the head of the Treasury, in spite of the broadest hints from Lord Bute that the time had come for resignation, are exactly analogous to the undignified persistency with which later Cabinets have occasionally clung to office in the face of intimations that the House desired a change of government. As long as a master does not directly dismiss a servant, the question whether the employer's conduct betrays a wish that the servant should give notice must be an inquiry giving rise to doubt and discussion. And if there be sometimes a difficulty in determining what is the will of Parliament, it must often of necessity be still more difficult to determine what is the will of the nation, or, in other words, of the majority of the electors.

From the above analysis, two questions arise for consideration :

- (1) When is a Ministry to be considered to have lost the confidence of the House, to which it is responsible, based on an expression of opinion or a vote in the House ?
- (2) When is a Ministry to be considered no longer to enjoy the confidence of the House due to loss of majority support in the House when the Assembly is not in session ?

A further question which arises from question No. (2) is : is it invariably incumbent that the majority support or its loss must be determined only on the floor of the Legislature ?

Question No. (1) has not, fortunately, posed any serious problem so far. It is now accepted that, if a Ministry is defeated in the Legislative Assembly on an adverse vote amounting to an expression of want of confidence, the Ministry must resign and vacate office. This is not to say that every single defeat necessarily demands the resignation of the Ministry. As stated, this would follow only where the defeat implies loss of confidence. It is open to the Opposition always to test the majority support through a motion of no-confidence. Equally, a Ministry may treat a particular expression of opinion by the House as an expression of want of confidence and resign. (Example: Resignation of the E.M.S. Namboodiripad United Front Ministry in Kerala in November, 1969, on the issue of a motion for an enquiry against certain Ministers under the Commission of Inquiries Act).

In considering Question No. (2), we may take into account broadly the following situations, based on past experience:

- (i) A single-party Ministry, which enjoyed a majority in the Legislative Assembly at the time it was installed in office, loses its majority because of defections in its ranks, or due to a depletion of its strength for some other reason, *e.g.*, a split in the party.
- (ii) A Ministry formed by a combination of parties, and thereby enjoying majority support in the Legislative Assembly, loses that support by the withdrawal from the combination of one or more of the partners in the combination.
- (iii) A minority government put into office on the basis of promised support by other parties or groups at the time of its induction into office is subsequently denied such support either partly or wholly.

As stated earlier, these are situations arising when the Assembly is not in session.

Situation (i): Following the analogy of what happened at the Centre recently when the Congress Party split, there should be no occasion for the Governor to withdraw his pleasure from the Council of Ministers so long as the Ministry continues to enjoy majority support in the Assembly. In other words, the test of confidence in the Ministry should normally be left to a vote in the Assembly. If, however, a Ministry with its party's reduced numerical strength avoids facing the Assembly by the expedient of refusing to convene it, and takes advantage of article 174(1) which permits a six months gap between two sessions, is the Governor to acquiesce merely because the Constitution permits it ?

It may be claimed that, as a session of the Assembly has to be summoned on the advice of the Council of Ministers, the Chief Minister would be within his rights to continue in office so long as he does not violate the provision contained in clause (1) of article 174. On the other hand, the Governor, if he chooses to remain a silent spectator in a situation like this, would lay himself open to the charge of partisanship as, by not summoning the Assembly at regular intervals, the Council of Ministers would be avoiding the vigilant and constant control of the Assembly. As pointed out by the President in his address, "in a parliamentary system, the imperative of continued and open support of the Legislature to the executive in all its actions has to be an essential consideration". On this issue, the Conference of Presiding Officers, held in New Delhi on April 7, 1968, recommended :

Where, however, there is undue delay in summoning a Legislative Assembly and the majority of members of the Legislative Assembly desire to discuss a motion of no-confidence in a Ministry, and make a request to that

effect in writing to the Chief Minister, the Chief Minister shall advise the Governor to summon the Assembly within a week of such request.

This recommendation may not always be practicable. It presupposes that, in the event of undue delay in summoning the Legislative Assembly, the majority of its members desiring to discuss a no-confidence motion will make a request to the Chief Minister to that effect, and the Chief Minister will, in deference to it, advise the Governor to summon the Assembly within a week. If the Chief Minister were to act in accordance with such request, there would be no problem, and the task of the Governor would be rendered easier. Otherwise, and in most cases, the Governor would have to depend upon his own information and deal with the situation accordingly. He would naturally bear in mind that the Assembly cannot be summoned without or against the advice of the Chief Minister as, aside from constitutional reasons, it is the Chief Minister alone who can provide the Assembly with business to transact. But, where the Governor is satisfied, by whatever process or means, that the Ministry no longer enjoys majority support, he should ask the Chief Minister to face the Assembly and prove his majority within the shortest possible time. If the Chief Minister shirks this primary responsibility and fails to comply, the Governor would be in duty bound to initiate steps to form an alternative Ministry. A Chief Minister's refusal to test his strength on the floor of the Assembly can well be interpreted as *prima facie* proof of his no longer enjoying the confidence of the Legislature. If then, an alternative Ministry can be formed which, in the Governor's view, is able to command a majority in the Assembly, he must dismiss the Ministry in power and instal the alternative Ministry in office. On the other hand, if no such Ministry is possible, the Governor will be left with no alternative but to make a report to the President under article 356, and to recommend at the same time the dissolution

of the Assembly. The prospect of President's rule and of dissolution may well prove to be a salutary corrective in situations in which constitutional requirements are sought to be undermined.

In regard to *situation No. (ii)*, a number of difficulties arise. In the first place, a government based on the coalition of a number of parties is a new practice in our country. Reference has already been made to the current phenomenon of tenuous association of parties and groups merely to capture political power. Governments formed by *Samyukta Vidhayak Dals* have raised numerous problems which are still in the process of unfolding. The recent episode in Uttar Pradesh relating to the Ministry headed by Shri Charan Singh provides a striking example. His Ministry had two partners: (1) the B.K.D. of which Shri Charan Singh was the leader, and (2) the Congress (R). The Congress (R) was the major partner in the sense that it had a much larger number of members in the Assembly than the B.K.D. There was an open split between the two partners and each publicly disowned confidence in the other. Shri Charan Singh asked for the resignation of all the Ministers belonging to Congress (R) in his Cabinet, failing which he requested the Governor to dismiss all those Ministers. He claimed this as his prerogative as Chief Minister. The Congress (R) Ministers declined to oblige Shri Charan Singh and, instead, wanted the Governor to dismiss Shri Charan Singh. Obviously, Shri Charan Singh and his Ministry had ceased to command the majority support which it enjoyed prior to the split. Shri Charan Singh claimed the right to have the Ministers of Congress (R) dismissed on the ground that, having been appointed on the advice of the Chief Minister, they could hold office only so long as they were acceptable to him. The Governor was faced with the question whether he was bound to accept the advice of the Chief Minister, or with the Chief Minister having obviously lost his majority, to ask the Chief

Minister himself to resign. The Chief Minister refused to resign on the plea that, notwithstanding the split in the coalition, he continued to enjoy majority support in the Assembly and was prepared to demonstrate it on the floor of the House. The questions to consider in this situation were: whether, after the two parties forming the Government had openly announced their withdrawal of support from each other, the basis of the majority support of the then Council of Ministers had not disappeared; whether in the resulting situation it would not be proper for the Chief Minister himself to tender his resignation (and thereby the resignation of the entire Council of Ministers) so that a new Council of Ministers might be formed with a new basis of majority support; whether the Chief Minister had the right, in such a situation, to demand the dismissal of the Ministers belonging to the party with whom he had parted company in the coalition; and, finally, whether the Governor should have given the Chief Minister an opportunity of proving his majority in the Assembly, notwithstanding the break-up of the coalition.

The Attorney-General of India, to whom the Governor referred the matter, answered:

To my mind, the continuance of the coalition Ministry in spite of the differences among the parties composing the Ministry having come to a head as aforesaid and the advice of Shri Charan Singh as Chief Minister of such Coalition Ministry as referred to in paragraph 2 (e)* hereof would be unthinkable in Britain not only because of the essentially two-party system but also because of a strong sense of political morality and constitutional propriety prevailing in that country. The

*2(e) Shri Charan Singh as Chief Minister has asked 13 Congress (R) Ministers and one B.K.D. Minister to resign, and, on their refusal to resign, Shri Charan Singh, as Chief Minister, has advised the Governor to dismiss these Ministers and allocate their portfolios to him.

well-recognised principles of parliamentary democracy would not, in my view, warrant the continued existence of a Coalition Ministry when the Coalition is broken and when none of the two parties which formed the Coalition commands an absolute majority in the Legislative Assembly. The well-recognised principles of parliamentary democracy would, in my view, also demand a resignation of the Coalition Ministry as a whole and an advice by the Chief Minister of the Coalition Ministry to the Governor in that behalf as soon as differences between the two parties of the Coalition come to a head and cannot be resolved. In a parliamentary democracy the Chief Minister would, in my view, have no constitutional right in such a situation to advise the Governor to dismiss some Ministers of the Coalition Ministry, particularly when such Ministers belong to a party which has a number of members larger than the party to which the Chief Minister belongs in the Legislative Assembly and when the Chief Minister was appointed as such by the Governor in the circumstances referred to in paragraph 2 (a)* hereof. Nor would the Governor be constitutionally bound to accept such advice of the Chief Minister.

In view of the fact that the differences between the parties forming the Coalition Ministry have come to a head and cannot be resolved, there can, in my view, be no question of awaiting any verdict of the Legislative Assembly. The partners to the Coalition Ministry have openly parted with each other. There is no verdict that the Legislative Assembly can give.

*2(a) After the resignation of the previous Chief Minister, Shri C. B. Gupta, the Governor called upon Shri Charan Singh to head a new Council of Ministers. This was done after the Governor was assured by the leader of the Congress(R) Party, Shri Kamalapati Tripathi, that his party has decided to support Shri Charan Singh's Government.

It is true that the Chief Minister in a parliamentary system occupies a pre-eminent position in the Cabinet, and he is the key-stone of the arch of the Cabinet; but this can apply only when he heads a team which collectively has majority support in the Legislature. When the Chief Minister heads a single party Government, his pre-eminence is unquestioned, but, in a coalition or a multi-party government, his pre-eminence is derived solely from agreement among the partners. Thus, the Chief Minister cannot claim the right of advising the Governor in the matter of appointment or dismissal of Ministers in such a manner as to break the arch and yet claim the right to continue himself as Chief Minister. While, ordinarily, collective responsibility can be exercised only through the Chief Minister, he loses, in a coalition government, all sanction for such exercise the moment the coalition dissolves. It is clear that he cannot break up the coalition by seeking to dismiss the Ministers representing the partnership and yet claim to remain in office himself. This is all the more so when the Ministers whose removal from office he seeks represent the major partner.

It may be observed here that the questions arising out of the U.P. crisis are really not questions of law. They are questions based on conventions of the Constitution and, in a sense, also political questions arising primarily from the failure to observe constitutional principles. In situations of this nature, the Governor has to make an assessment of the various circumstances involved, take into account the relative party positions of the different groups in the Assembly and, to the best of his ability, try to ensure that a responsible government is in office. He may hold consultations with leaders of other parties in an effort to ensure the maintenance of the constitutional machinery. In a situation in which leaders of political parties are not acting according to the rules of constitutional propriety, he has the responsibility to ensure that the parliamentary process does

not break down. He has, at the same time, also the difficult responsibility to ensure that such methods are not adopted as would stultify the parliamentary process itself. As a general proposition, it may be stated that, as far as possible, the verdict as to majority support claimed by a Chief Minister and his Council of Ministers should be left to the Legislature, and that it is only if a responsible government cannot be maintained without doing violence to correct constitutional practice that the Governor should resort to article 356 of the Constitution.

In the peculiar conditions which have prevailed or may be prevailing in some of the States, and the multiplicity of parties functioning in them, it has been a regrettable feature of our political life that we have sometimes had governments formed by combinations of parties or groups without any common well-defined programme or mandate from the electorate. A Governor often faces the difficulty of being confronted with a list of names of legislators belonging to divergent parties and groups stated to be willing to support a government formed under a particular leadership. Their loyalties or the loyalties of some of their members shift and change, leading to uncertainty of majority support on the basis of which the government came into office. Quite often "independents" also play a hand in this. Responsible government, it is well to remember, is not a game of numbers, far less an automatic device which can be manufactured to specification; it is not even "a machine which will run on a motive power of its own". To quote the *Joint Committee on Indian Constitutional Reform, Vol. I, Part I* :

Parliamentary government, as it is understood in the U.K., works by the interaction of four essential factors: the principle of majority rule; the willingness of the minority for the time being to accept the decisions of the majority; the existence of great political parties divided by broad issues of policy, rather than

by sectional interests; and finally the existence of a mobile body of political opinion, owing no permanent allegiance to any party and, therefore, able, by its instinctive reaction against extravagant movements on one side or the other, to keep the vessel on an even keel.

Even in a single party government, it is not unusual for a Prime Minister or a Chief Minister, who wants to get rid of an unwanted colleague, to submit the resignation of the entire Ministry and seek its re-constitution after excluding the unwanted colleague or colleagues.

In the light of all these considerations, it would seem proper, in the interest of upholding correct constitutional practice, that, in a coalition where there is an open split among the partners and one or more of them withdraw support from the Ministry, the Chief Minister, instead of demanding the resignation of his colleagues with whom he is no longer in accord, should submit his own resignation which implies the resignation also of his Council of Ministers. In such an event, he may, if he so chooses, stake a fresh claim to form a new Ministry with majority support, and the Governor may, if he is satisfied that such support exists, allow him to form the Government. However, if the Chief Minister fails to resign in such circumstances, the Governor should forthwith initiate steps for exploring the possibilities of forming an alternative government. Only where he finds that there is no such possibility, he must report to the President in terms of article 356.

If some Ministers in a coalition belonging to a particular party or group themselves resign due to disagreement with the Chief Minister or any other reason, the Chief Minister may not necessarily resign. If, however, his majority in the Assembly is threatened by the resignations, it would be expected of him to

demonstrate his continuing strength in the Assembly by advising the Governor that the Assembly be summoned within the shortest possible time and obtaining its verdict in his favour. If the Chief Minister does not follow this procedure, the Governor should start consultations with the leaders of other parties with a view to forming another government. If the Governor is satisfied that there is another leader who can form a government with majority support, he should invite him to form the Ministry. The Governor would then be justified in withdrawing his "pleasure" from the existing Chief Minister and his Council of Ministers. On the other hand, if the Governor is satisfied that there is no one who is in a position to command a majority in the Legislature, he must make a report to the President in terms of article 356 of the Constitution and also recommend dissolution. Dissolution in this case would be the proper course to adopt because the electorate would then have the chance of voting to power a stable government.

The answer to *situation (iii)* is covered by the answer to *situation (i)*.

The most important basis for a parliamentary system is the sovereignty of the people, the electorate, which is the ultimate source of political power. The Governor has a duty to see that the Constitution is maintained; he has equally a duty to see that constitutional principles are not violated. In determining, therefore, when he should withdraw his pleasure, he should keep before him in the forefront the oath taken by him under the Constitution "to preserve, protect and defend the Constitution".

While there may be a good many arguments to discourage a Governor from exercising his power of withdrawal of pleasure except on undisputable evidence of the actual voting in the House, as observed by Viscount Radcliffe in a Nigerian case which came up before the Privy Council, it is none the less

impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford to the Governor the evidence he is to look for, even without the testimony of recorded votes.

VI SUMMONING, PROROGATION AND DISSOLUTION OF LEGISLATIVE ASSEMBLY

Under clause (1) of article 174, the Governor *shall* from time to time summon the House or each House of the Legislature of the State at such time and place as he thinks fit. Under clause (2), the Governor *may* from time to time—

- (a) prorogue the House or either House;
- (b) dissolve the Legislative Assembly.

It is well-established that, in the summoning of the Legislature, the Governor has to act on the advice of his Council of Ministers. It is the Council of Ministers which provides business for a session of the Legislature, and, therefore, it follows that for the Governor to act otherwise than in accordance with such advice would be without purpose. To a suggestion made in the Constituent Assembly that the power of summoning of the Legislature should be vested in the Speaker or the Chairman, Dr. Ambedkar replied:

The Speaker cannot provide business for the Assembly, nor can the Chairman provide it. The business has to be provided by the Executive, that is to say, by the Prime Minister who is going to advise the President to summon the Legislature. Therefore, merely to give the power to the Speaker or the Chairman to summon the Legislature without making provisions for the placing of business to be transacted by such an Assembly called for in a session by the Speaker or the Chairman would to my mind be a futile operation.

As regards prorogation, the Governor should normally act on the advice of his Council of Ministers.

A point has arisen, however, whether a Chief Minister has the right to advise prorogation when there is pending in the Legislative Assembly a notice of a motion of no-confidence against his Ministry. The Governor in such a case should first satisfy himself that the notice of the no-confidence motion is not frivolous and is a genuine exercise of the parliamentary right of an Opposition to challenge the Government's majority. If so satisfied, the Governor should ask the Chief Minister to face the Assembly and allow the motion to be debated and voted upon. To prorogue the Assembly otherwise would amount to avoidance of responsibility of the Council of Ministers to the Assembly.

There remains the power to dissolve the Legislature Assembly. Questions have been raised, (i) whether this power is to be exercised only on the advice of the Council of Ministers, or, (ii) whether the Governor has a "discretion" in the matter, or he may act in his individual judgment, and, if the latter, in what circumstances?

The duration of every Legislative Assembly, unless sooner dissolved, is five years as fixed by the Constitution. The five-year period is calculated from the date appointed for the first meeting of the House after it is duly constituted following a general election. The expiry of five years from that date shall operate as a dissolution of the House. Here, no question arises of the Governor exercising the power of dissolution because dissolution takes place by mere efflux of time. The Assembly may, however, be dissolved earlier by the Governor. An earlier dissolution may become necessary in any one of the following contingencies :

- (1) The Government is defeated in the State Legislative Assembly on an adverse vote amounting to an expression of want of confidence in the Council of

Ministers, and no alternative Government can be formed.

- (2) The Chief Minister asks for dissolution on the ground that, due to certain changed circumstance, the Government feels that it should seek a fresh mandate from its political sovereign, the people.

The Assembly may also be dissolved earlier than five years if, on account of failure of the constitutional machinery in the State, the administration of the State is taken over by the President (Union Government) under article 356 of the Constitution, and consequently it is considered advisable to order dissolution.

There have been a number of dissolutions of State Legislative Assemblies earlier than the five-year period, more particularly after the 1967 general elections. These dissolutions were mainly due to instability of government in those States. In most cases, the dissolution followed the imposition of President's rule under article 356. There has also been at least one instance (in Kerala in 1965) where the Assembly was dissolved immediately following a general election because no party secured an absolute majority, and no party was in a position to form a government.

Normally a Governor should exercise the power of dissolution on the advice of the Council of Ministers. If a Chief Minister who enjoys majority support advises dissolution, the Governor must accept the advice, but if he advises dissolution after losing his majority, the Governor need accept his advice only if the Ministry suffers a defeat on a question of major policy and the Chief Minister wishes to appeal to the electorate for a mandate on that policy. In the case of a Chief Minister heading a single party Government which has been returned by the electorate in absolute majority, if the ruling party loses its majority because of defection by a few members, and the Chief

Minister recommends dissolution so as to enable him to make a fresh appeal to the electorate, the Governor may grant a dissolution. The mere fact that a few members of the party have defected does not necessarily prove that the party has lost the confidence of the electorate. If there is a no-confidence motion against a Ministry and the Chief Minister, instead of facing the Assembly, advises the Governor to dissolve the Assembly, the Governor need not accept such advice, but should ask the Chief Minister to get the verdict of the Assembly on the no-confidence motion.

In cases where a Governor grants dissolution on the advice of the Chief Minister, it is presumed that the Ministry which advised dissolution will remain in office until the elections are over and a new Ministry installed. Where the Governor does not accept the Chief Minister's advice for dissolution, he should either take steps to instal another Ministry which, in his opinion, may have majority support, or make a report to the President in terms of article 356 and recommend dissolution of the Assembly at the same time.

We may refer at this stage to three recent cases of requests for dissolution by Chief Ministers who had lost majority support :

- (1) In May last, the Chief Minister of Gujarat, pursuant to a resolution passed by the Council of Ministers, recommended to the Governor the dissolution of the Assembly. Admittedly, at that time, the Ministry no longer had majority support in the Assembly due to depletion in its own party strength and certain other political developments. When this advice was tendered to the Governor, the Assembly had not approved the Budget and passed the Appropriation Bill for the year. There was only a vote on account passed

for four months. This made it essential for the Budget to be approved and the Appropriation Bill passed before July 31, 1971. Had the Assembly been dissolved, as recommended by the Ministry, it would not have been possible to have fresh elections and a duly constituted Assembly to pass the Budget before that date. The Governor accordingly declined to accept the recommendation of the Ministry. Instead, he made a report to the President in terms of article 356. This was the only course open to him in the circumstances, as (i) the Ministry could not have continued in office without the Budget being passed, and (ii) there was no alternative government possible to get the Budget passed by the Assembly. The entire machinery of government would thus have come to a stand-still. The Governor, along with his recommendation for imposition of President's rule, also recommended dissolution of the Assembly. The Chief Minister to whom the Governor explained the position acquiesced in the Governor's action.

- (2) On June 1, 1971, the Chief Minister of Bihar submitted his resignation along with that of his Council of Ministers and, in doing so, recommended that the Assembly be dissolved and fresh elections be held. The Governor did not accept the recommendation because he was convinced from the facts available to him that the Ministry had lost majority support in the Assembly. 37 out of 171 members, who had pledged support to the Ministry when it was formed in December, 1970, had communicated to the Governor in writing that they had withdrawn their support. There was also a no-confidence motion against the Ministry due to be tabled on the opening day of the Assembly,

namely, June 1, 1971, which would have decided whether the Ministry continued to enjoy majority support or not. The Governor, in these circumstances, declined to accept the recommendation of the Ministry for dissolution of the Assembly and took steps to instal an alternative Ministry in office which he did on June 2, 1971.

- (3) On the evening of June 12, 1971, the Chief Minister of Punjab met the Governor and told him that certain political parties in the State were "trying to encourage defections from the Akali Dal in an unprincipled manner and that the likelihood of such defections is having an adverse impact on the political situation in the State". The Chief Minister also told the Governor that "such a situation would not only lead to political uncertainty but also paralyse the administration and would have an adverse effect on the morale of the services". The Chief Minister, therefore, suggested to the Governor an immediate dissolution of the Legislative Assembly as he wanted to seek "a fresh mandate from the people". The Chief Minister sent his formal advice to this effect on June 13, 1971. The Governor accepted the advice and dissolved the Assembly with immediate effect. Simultaneously, on the same day, the Chief Minister also tendered the resignation of his Council of Ministers and the Governor accepted the resignation.

The situation in Punjab at the time of dissolution of the Assembly was in some respects similar to that in Gujarat. The Punjab Assembly had not approved the Budget and passed the Appropriation Bill for the year. The Assembly had only granted a vote on account for three months, which meant that the Budget would have to be approved and the Appropriation

Bill passed before June 30, 1971. The Assembly had been convened to meet on June 14, 1971, for this very purpose.

On June 13, after dissolving the Assembly and accepting the resignation of the Ministry, the Governor made a report to the President in terms of article 356.

The situation that developed in West Bengal towards the end of June had also some similarity to the situation in Punjab on the question of dissolution as far as the constitutional position was concerned. The Chief Minister, while claiming majority support in the Legislative Assembly, recommended to the Governor the dissolution of the Assembly because, in view of the abnormal conditions prevailing in the State caused by the influx of refugees from Bangla Desh, he (Chief Minister) was driven to the conclusion that it would not be right for his Government to continue in office without seeking a fresh mandate from the people. The Governor accepted the recommendation of the Chief Minister and dissolved the Assembly. The Chief Minister subsequently tendered the resignation of his Ministry, which the Governor accepted. The Government in any case could not have continued to remain in office for want of financial sanction. There was only a vote on account which enabled the Ministry to carry on the Government till July 31, and the budget of the State had not been voted by the Assembly.

The main issue which arises out of these cases is what the Governor should do if the Chief Minister recommends dissolution of the Assembly when the Budget has not been voted. Is the Governor to accept such a recommendation even if the Ministry claims that it continues to enjoy majority support? It seems clear to us that a Ministry in such a situation should face the Assembly and get the Budget passed before seeking dissolution for whatever reason. If, on the other

hand, there is reason to believe that the Chief Minister no longer commands majority support, it is clearly open to the Governor to take steps to ascertain if it is possible to instal another Ministry which is able to command majority support and get the Budget passed. Failing both, the Governor has no alternative except to make a report to the President under article 356 because Parliament alone could then sanction appropriation for carrying on the administration of the State. No Ministry in such a situation could possibly continue in office without budgetary sanction, and the administration would come to a stand-still.

It follows from this review that a Governor is not bound to accept the advice of a Chief Minister to dissolve the Assembly if the Chief Minister has lost majority support. The practice, or convention, of invariably accepting the advice to dissolve developed along with the two-party system. In a multi-party system, however, particularly as witnessed in India in the form of the *Samyukta Vidhayak Dals* or group alignments, different considerations arise. Acceptance of the Ministry's advice in this regard must always be based on the assumption that it represents the wish of the majority of the Legislature. In situations like these, therefore, the Governor should weigh all the factors carefully before taking his decision on the advice of the Ministry to dissolve the Assembly.

The dissolution in December, 1970, of the Lok Sabha when Shrimati Indira Gandhi's Government continued to enjoy majority support in that House and the dissolution of the Tamil Nadu Legislative Assembly in January, 1971, when the Ministry had a decisive majority in the Assembly are examples of dissolution being granted while the Ministry continued to enjoy majority support in the House. So long as the Constitution functions in the normal manner, dissolution must rest upon the advice of the Council of Ministers.

According to British constitutional conventions, though the power to grant to a Prime Minister a dissolution of Parliament is one of the personal prerogatives of the Sovereign, it is now recognized that the Sovereign will normally accept the advice of the Prime Minister, since to refuse would be tantamount to dismissal and involve the Sovereign in the political controversy which inevitably follows the resignation of a Ministry. A Prime Minister is entitled to choose his own time within the statutory five-year limit for testing whether his majority in the House of Commons still reflects the will of the electorate. Only if a break-up of the main political parties takes place can the personal discretion of the Sovereign become the paramount consideration. There are, however, circumstances when a Sovereign may be free to seek informal advice against that of the Prime Minister. Professor Wade, in *CONSTITUTIONAL LAW* (Wade and Phillips, Eighth Edition 1970), states these circumstances thus:

If the Sovereign can be satisfied that (1) an existing Parliament is still vital and capable of doing its job, (2) a general election would be detrimental to the national economy, more particularly if it followed closely on the last election, and (3) he could rely on finding another Prime Minister who was willing to carry on his Government for a reasonable period with a working majority, the Sovereign could constitutionally refuse to grant a dissolution to the Prime Minister in office.

Prof. Wade further observes:

It will be seldom that all these conditions can be satisfied. Particularly dangerous to a constitutional Sovereign is the situation which would arise if having refused a dissolution to the outgoing Prime Minister he was faced by an early request from his successor for a

general election. Refusal might be justified if there was general agreement inside and outside the House of Commons that a general election should be delayed and clearly it would be improper for a Prime Minister to rely on defeat on a snap vote to justify an election.

A question was raised at the time the Union Cabinet advised the President to dissolve the Lok Sabha in December last whether a Prime Minister would be justified in asking for a dissolution in order to strengthen his position in the party. Here, the observations of Hood Phillips in his latest book, *REFORM OF THE CONSTITUTION* (1970), are relevant:

There is no precedent in this country of a Prime Minister, whose party has a majority in the Commons, asking for a dissolution in order to strengthen his weakening hold over his own party. If he did ask for a dissolution in such circumstances the better opinion is that the Queen would be entitled, perhaps would have a duty, to refuse. In the normal case when the Sovereign grants a dissolution this is on the assumption that the Prime Minister is acting as leader on behalf of his party. Otherwise the electorate could not be expected to decide the question of leadership. So if the Sovereign could find another Prime Minister who was able to carry on the government for a reasonable period, she would be justified in refusing a dissolution. Something like this happened in South Africa in 1939 when the question was whether South Africa should enter the war: the Governor-General refused a dissolution to Hertzog, who resigned and was replaced by Smuts who succeeded in forming a Government.

Dissolution also acts as a deterrent against instability. Drawing a lesson from the recent general elections (March 1971) to the Lok Sabha, it would be correct to infer that one of the

dominant reasons of the Congress (R) obtaining such a decisive victory was the desire of the electorate to instal at the Centre a stable government under durable leadership.

VII FAILURE OF CONSTITUTIONAL MACHINERY IN A STATE (ARTICLE 356)

We may first examine the precise import of article 356 which sanctions President's rule in a State in the event of a break-down of the constitutional machinery. For our present purpose, it is enough to read the language of clause (1) of the article:

356. (1) If the President, on receipt of a report from the Governor of a 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 power 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 authorise 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.

“The salient features of this provision”, in the words of Shri Alladi Krishnaswami Ayyar (speaking in the Constituent Assembly), “are that immediately the Proclamation is made, the executive functions (of the State) are assumed by the President. What exactly does this mean? As members need not be repeatedly reminded on this point, ‘the President’ means the Central Cabinet responsible to the whole Parliament in which are represented representatives from the various units which form the component parts of the Federal Government. Therefore, the State machinery having failed, the Central Government assumes the responsibility instead of the State Cabinet. Then, so far as the executive government is concerned, it will be responsible to the Union Parliament for the proper working of the Government in the State. If responsible government in a State functioned *properly*, the Centre would not and could not interfere.”

While the Proclamation is in operation, Parliament becomes the Legislature for the State, and the Council of Ministers at the Centre is answerable to Parliament in all matters concerning the administration of the State. Any law made pursuant to the powers delegated by Parliament by virtue of the Proclamation is required to be laid before Parliament and is liable to modification by Parliament. Thus, a State under President’s rule under article 356 virtually comes under the executive responsibility and control of the Union Government. Responsible government in the State, during the period of the

Proclamation, is replaced by responsible government at the Centre in respect of matters falling normally in the State's sphere.

In discussing article 356, attention is inevitably drawn to section 93 of the Government of India Act, 1935. This section had attained a certain notoriety in view of the enormous power that it vested in the Governor and the possibility of its misuse, the Governor being the agent of the British Government. Many of the leading members of the Constituent Assembly had occupied important positions as Ministers in the Provinces following the inauguration of Provincial autonomy and had thus first-hand experience of the working of this particular section and the possible effect of having in the Constitution a provision like section 93. There was, therefore, considerable discussion, both in the Constituent Assembly and in Committees, on the advisability, or necessity, of incorporating the provision in the Constitution. Pandit H. N. Kunzru, who had serious apprehensions regarding this provision, suggested the limiting of the Governor's functions to merely making a report to the President, it being left to the President to take such action as he considered appropriate on the report. Pandit Govind Ballabh Pant agreed with Pandit Kunzru in principle. The former referred in particular to the administrative difficulties that would be created by giving powers to the Governor to act on his own initiative over the heads of his Ministers.

The whole question was examined at a meeting of the Drafting Committee with Premiers of Provinces on July 23, 1949. Pandit Pant again expressed the view that the Governor should not come into the picture as an authority exercising powers in his discretion. Armed with such powers, he would be an autocrat and that might lead to friction between him and his Ministers.

Shri Alladi Krishnaswami Ayyar tried to allay apprehensions in the minds of the members of the Constituent Assembly about the similarity between section 93 of the Government of India Act and the provision made in article 356 of the Constitution. He said in the Constituent Assembly:

There is no correspondence whatever between the old section 93 (of the Government of India Act, 1935) and this except in regard to the language in some parts. Under 93, the ultimate responsibility for the working of section 93 was the Parliament of Great Britain which was not certainly representative of the people of India, whereas under the present article the responsibility is that of the Parliament of India which is elected on the basis of universal franchise, and I have no doubt that not merely the conscience of the representatives of the State concerned but also the conscience of the representatives of the other units will be quickened and they will see to it that the provision is properly worked. Under those circumstances, except on the sentimental objection that it is just a repetition of the old section 93, there is no necessity for taking exception to the main principle underlying this article.

In winding up the debate on the emergency provisions, Dr. Ambedkar observed:

In regard to the general debate which has taken place in which it has been suggested that these articles are liable to be abused, I may say that I do not altogether deny that there is a possibility of these articles being abused or employed for political purposes. But that objection applies to every part of the Constitution which gives power to the Centre to override the Provinces. In fact I share the sentiments expressed by my honourable friend Mr. Gupte yesterday that the

proper thing we ought to expect is that such articles will never be called into operation and that they would remain a dead letter. If at all they are brought into operation, I hope the President, who is endowed with these powers, will take proper precautions before actually suspending the administration of the provinces.

Dr. Ambedkar's hope that this provision would be used sparingly, it must be admitted, has not been fulfilled. During the twenty-one years of the functioning of the Constitution, President's rule has been imposed twenty-four times—the imposition of President's rule in Kerala on November 1, 1956, was a continuation of President's rule in Travancore-Cochin imposed earlier on March 23, 1956—the State of Kerala having been under President's rule five times and for the longest period. Out of seventeen States (not taking into account PEPSU which later merged into Punjab, and excluding Himachal Pradesh which became a State only recently), eleven have had spells of President's rule. The kind of political instability in some of the States that we have witnessed and the politics of defection which has so much tarnished the political life of this country were not perhaps envisaged in any measure at the time the Constituent Assembly considered the draft Constitution. No Governor would, it can be safely asserted, want the State to be brought under President's rule except in circumstances which leave him with no alternative.

The article, as finally adopted, limits the functions of the Governor to making a report to the President that a situation has arisen in which there has been failure of the constitutional machinery. The decision whether a Proclamation may be issued under article 356 rests with the President, that is to say, the Union Government. Significantly, the President can exercise the

power "on receipt of a report from the Governor *or otherwise*" if he is satisfied that the situation requires the issue of such a Proclamation.

Some of the circumstances in which President's rule may have to be imposed have already been discussed. What is important to remember is that recourse to article 356 should be the last resort for a Governor to seek. A frequent criticism of the Governor in this connection is that he sometimes acts at the behest of the Union Government. This criticism emanates largely from a lack of appreciation of the situations which confront the Governors. Imposition of President's rule normally results in the President vesting the Governor with executive functions which belong to his Council of Ministers. This is a responsibility which no Governor would lightly accept. Under President's rule he functions in relation to the administration of the State under the superintendence, direction and control of the President and concurrently with him by virtue of an order of the President.

As Head of the State, the Governor has a duty to see that the administration of the State does not break down due to political instability. He has equally to take care that responsible Government in the State is not lightly disturbed or superseded. In ensuring these, it is not the Governor alone but also the political parties which must play a proper role. Political parties come to power with a mandate from the electorate and they owe primary responsibility to the Legislature. The norms of parliamentary government are best maintained by them.

Before leaving this issue, we would like to state that it is not in the event of political instability alone that a Governor may report to the President under article 356. Reference has been made elsewhere in this report to occasions where a Governor may have to report to the President about any serious internal disturbances in the State, or, more especially of the existence or

possibility of a danger of external aggression. In such situations also it may become necessary for the Governor to report to the President for action pursuant to article 356.

It is difficult to lay down any precise guide-lines in regard to the imposition of President's rule. The Governor has to act on each occasion according to his best judgment, the guiding principle being, as already stated, that the constitutional machinery in the State should, as far as possible, be maintained.

VIII GOVERNOR'S ROLE AS CHANCELLOR

Although not specifically referred to the Committee, it is relevant to deal in this report with the Governor's role as Chancellor of the Universities in his State wherever this role is assigned to him *ex-officio* by legislation. While both the Chancellor and the Governor or Government are expected to have due regard to the autonomy of the Universities, there are certain distinctions between the role of the Governor or Government and the role of the Chancellor. For one thing, the Chancellor is an Officer of the University and is entrusted with certain powers and duties under the Act governing the University. Secondly, even though opinion differs with regard to the necessity for the Chancellor to act on the advice of his Ministers—we have no doubt that it would be advisable for him to consult his Chief Minister and the Ministers concerned in the more important administrative matters, specially such as may throw a burden on the finances of the State—the fact has to be borne in mind that, while the Governor is immune from suit and it is not open to anyone to question whether any or, if so, what advice was tendered to him, the Chancellor does not enjoy similar immunity and is liable to be dragged into court and questioned. It is, therefore, incumbent on the Ministers, and even more necessary for the Chancellor, to weigh the advice most carefully, particularly on matters or procedures which may be or become justiciable. The ultimate

decision should, in such case, rest with the Chancellor. There is, even otherwise, advantage in this as, being or expected to be above party, the Chancellor's decision is less likely to be interpreted as motivated by considerations of local politics or patronage. In any event, it would be the decision of an Officer of the University, not of any authority outside it.

IX CONVENTIONS

Conventions of the Constitution, according to Dicey's classic definition, consist of "customs, practices, maxims, or precepts which are not enforced or recognised by the Courts", but "make up a body not of laws, but of constitutional or political ethics". The broad basis of the operation of conventions has been set out in Prof. Wade's introduction to Dicey's *Law of the Constitution* (1962 edition). The dominant motives which secure obedience to conventions are stated to be :

- (1) the desire to carry on the traditions of constitutional government;
- (2) the wish to keep the intricate machinery of the ship of State in working order;
- (3) the anxiety to retain the confidence of the public, and with it office and power.

These influences secure that the conventions of Cabinet Government, which are based on binding precedent and convenient usage, are observed by successive generations of Ministers. The exact content of a convention may change or even be reversed, but each departure from the previous practice is defended by those responsible as not violating the older precedents. Objections are only silenced when time has proved that the departure from precedent has created a new convention, or has shown itself to be a bad precedent and, therefore, constituted in itself a breach of convention.

This exposition of the nature of conventions will show that, if they have to be observed and followed, the primary responsibility therefor will rest on those charged with the responsibility of government. In a parliamentary system, this responsibility unquestionably belongs to the elected representatives of the people who function in the Legislatures. They are mostly members of political parties who seek the suffrage of the electorate on the basis of promises made and programmes announced. The political parties, therefore, are concerned in the evolution of healthy conventions so that they "retain the confidence of the public, and, with it, office and power".

I feel that if (the Constitution) is workable, it is flexible and it is strong enough to hold the country together both in peace time and in war time. Indeed, if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is, that Man was vile.

These words were uttered by Dr. Ambedkar in the Constituent Assembly in moving consideration of the draft Constitution. It has become the fashion, when situations arise which may not be to the liking of a particular political party, to blame the Constitution. The Governors also inevitably get their share of the blame either because, it is alleged, they take a distorted view of the Constitution, or, as is also alleged, because the Constitution permits them to resort to "unconstitutional" acts. The essential structure of our Constitution relating to the functioning of the different branches of government is sound and capable of meeting all requirements. The conventions, or the guide-lines, that we are called upon to consider should be viewed in this background.

Conventions evolve from experience and from trial and error. The working of our Constitution during the past twenty-one years has exposed not so much any weaknesses in the Constitution as weaknesses in our political life. Some of these weaknesses will be evident from the discussions in the earlier part of this Report. The Governors, under our Constitution, do not govern; government is the primary concern of the Council of Ministers which is responsible to the Legislature and the people. Therefore, for a purposeful evolution of conventions, the willing co-operation of the political parties and their readiness to adhere to such conventions are of paramount importance. In recent years, it has been a regrettable feature of political life in some of the States, with the growing number of splinter parties, some of them formed on the basis of individual or group alignments and not of well-defined programmes or policies, that governments are formed with a leader—a Chief Minister—who comes to that office not as of right, with the previous acquiescence of followers and the deference of his colleagues, but as being the most “acceptable” candidate for the time. Much of his time and effort are, therefore, inevitably spent in finding expedients to keep himself in power and the Cabinet alive.

In the views expressed and conclusions drawn in regard to the various issues dealt with in this Report, the main source material has been taken from the records of the Constituent Assembly which framed our Constitution, the British Constitution which our Constitution follows in large measure in relation to the functioning of the parliamentary system, and the experiences gained and problems faced in the course of the working of our Constitution since its coming into force. Views and expressions of opinion of political leaders, jurists and students of the Constitution expressed from time to time have also been kept in view.

This Report does not lay down any rigid guide-lines for the Governors. It would be unrealistic and unwise to do so, quite apart from the fact that the Constitution itself does not make provision for such guide-lines. As the most recent cases of Gujarat, Bihar, Punjab and West Bengal would show, the circumstances and the situation in each case could not be exactly similar or identical. In discussing different issues, we have tried to place them in their proper perspective. We hope that, as desired by the President, this might lead to a consensus on the different issues and be of assistance to all of us in assessing each situation according to the circumstances and our own best judgment.

BHAGWAN SAHAY,
Chairman.

B. GOPALA REDDI
Member.

V. VISWANATHAN,
Member.

S. S. DHAVAN,
Member.

ALI YAVAR JUNG,
Member.

New Delhi,
October 1, 1971.