
CHAPTER I

ROLE OF PRESIDENT OF INDIA: (SOME ASPECTS)

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After prolonged discussions in the Constituent Assembly as to the form of Government that India would have, it was decided to adopt the Parliamentary system, as against the Presidential, according to which the executive would be answerable to the legislature for its actions. However, inter-alia, in view of the federal character of the Constitution envisaged for India as also because a single constitutional document was decided on for both the federal as well as for the constituent parts, it was felt desirable to fit into the parliamentary system the office of the President. To put it in a different way, it was the scheme of the Constitution that the President should function within the framework of the parliamentary system. In other words, the Presidential action was to conform to the will or the desire of the legislative organs and that happens to be, under the scheme of the Indian federation, the Parliament of India. That the action of the President should conform to the will or the desire of the Parliament of India alone is evident from the fact that although in the choice of the President the State legislatures are associated with the Union legislature, in no other matter connected with the normal working of the President the States come into the picture. Thus for instance the determination of the emoluments, allowances and privileges that the President

might be entitled to; the making of any provision as to the discharge of the functions of the President in any contingency not provided for in the Constitution; and even the power to impeach the President for the violation of the Constitution vests with the legislative organs of the Union Government. Yet, as the President could not be a member of either House of Parliament, he has no means of knowing directly the will of the Houses of Parliament according to which his actions should conform. Evidently some body is required to convey to the President the will of the two Houses of Parliament and since that body happens to be the Council of Ministers drawn from the two Houses of Parliament and collectively responsible to it, the Presidential action should conform to the advice tendered by the Council of Ministers. Not to conform with the advice tendered by the Council of Ministers is, therefore, against the scheme of the Constitution and the Parliamentary system envisaged for India. Hence to contend that the Presidential obligation to abide by the advice tendered by the Council of Ministers is dependent on the impeachment potentiality of the party in power is not the proper interpretation of the Constitution. Such an interpretation would mean that no Government could function effectively unless it has the following of two-thirds of the total membership of the two Houses of Parliament. In such a situation, a Government that does not have two-thirds of the total membership of the two Houses of Parliament supporting it would find itself pitted against the

President, matching its strength as it were, and might even prove ineffective if the President chooses to have his way. It is highly improbable that the framers of the Constitution would have envisaged such a parliamentary system wherein if the Government in power did not command a majority of two-thirds of the total membership of the two Houses of Parliament, the President's will could prevail. As a matter of fact, to vest such a power, in a parliamentary system of Government wherein a Council of Ministers is chosen from the two Houses of Parliament and collectively responsible to it, in the hands of a President indirectly elected, is unimaginable. Further, to say that the framers of the Constitution have left such a vital issue as to whether the President of the Indian Union should abide by the advice tendered by the Council of Ministers or not solely to conventions in that regard is hardly justified. At least in a parliamentary system of Government with a written Constitution such a position is untenable and unworkable in practice. More so, it would appear ridiculous to conceive of the Council of Ministers as merely a body of advisors to the President of the Indian Union, whose advice he may take or ignore, against the background of the duty cast on the Prime Minister to communicate to the President all decisions of the Council of Ministers relating to the administration of the Union and proposals for legislation and such other matters as provided for under Article 78 of the Constitution. Still further, as the President would not be answerable to any Court of Law

for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties, as per Article 361, in a governmental set-up which cannot command a two-thirds majority of total membership of the two Houses of Parliament, the President would find himself vested with absolute power of a dictator. With such an interpretation of the office of the Indian Presidency, it could be possible for the President to get rid of any set of Council of Ministers, excepting the one which has the backing of two-thirds of the total membership of the two Houses, either by consistently setting aside the advice tendered by them and thereby making them resign from their office or by taking an unpalatable decision and allowing it to pass off as if tendered by the Council of Ministers under cover of Article 74 (2). The more important thing is that if it was the intention of the framers of the Constitution that the advice tendered by the Council of Ministers should not be binding on the President, then the President cannot be impeached as that would not constitute a violation of the Constitution. As a matter of fact it was the intention of the founding fathers that the impeachment provision was to be resorted to rarely and under extraordinary circumstances. That was why a high majority was prescribed for the impeachment of the President. But if the interpretation of Article 74 (1) is that the advice tendered by the Council of Ministers is not binding on the President

then there is every likelihood of deadlocks becoming a regular feature necessitating thereby recourse to the impeachment provision more frequently. Therefore, if only the President is bound, under the written letter of the Constitution, to abide by the advice tendered by the Council of Ministers, he could be impeached for non-compliance on the ground that it was a violation of a constitutional provision and not otherwise.

Thus it has been shown that under the scheme of the Indian Constitution the President could not by-pass the advice tendered by the Council of Ministers. Nor is it that framers of the Constitution have left the question of the proper relationship between the President and the Council of Ministers, and more particularly if the President was to abide by the advice tendered by the Council of Ministers or not, solely to conventions in that regard or to the impeachment potentiality of the party in power. We are led to the conclusion that under the scheme of Indian Constitution the President has to abide by the advice tendered by the Council of Ministers even though it is constituted out of a single party or parties that singly or collectively command a bare majority in the House of the People. That being so, let us examine the relevant provisions of the Constitution to substantiate that contention. Incidentally, let us also find out as to why it has not been explicitly provided in the Constitution that the advice tendered by the Council of Ministers should be binding on the President.

It is an essential requirement of the Constitution to have a President for the Republic of India as well as a Council of Ministers with the Prime Minister at the head. The Constitution, besides vesting the executive power and the supreme command of the Defence forces of the Union in the President, also requires the President, under various provisions of the Constitution, to perform various other functions. But at the same time, the Constitution also requires that there should be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. In other words, in the exercise of his various functions, without any exception whatsoever, the President has to take the aid and advice of the Council of Ministers. Without any exception whatsoever because the President has no discretionary powers like the Governors of States - although the Constitution does not give even a vague idea about such discretionary powers the validity of the exercise of which cannot be questioned. As a matter of fact the language of Article 74 (1) is based on Section 9 of the Government of India Act, 1935, as amended by the Indian Independence Act, 1947 when India became a Dominion. Under Section 9 of the Government of India Act, 1935, two specific provisions were made in respect of the functions of the Governor-General, namely,

- i) where he could act in his own judgement, and
- ii) where he had to act according to the advice of the Ministers.

But when the Indian Independence Act was passed and India became a Dominion, an amendment was made by which the provisions which gave the power to the Governor-General to act in his discretion were deleted. So much so, the Governor-General under the Indian Independence Act had merely to act according to the advice of the Ministers and consequently the language of Section 9 of the Government of India Act as adapted under the Indian Independence Act read as:

" There shall be a Council of Ministers to aid and advise' the Governor-General in the exercise of his functions".

This is identically the language of Article 74 (1). 'Aid and advise' is a technical expression which has since acquired a definite meaning in constitutional law and whenever that expression was used, what was intended was that the 'aid and advise' shall be followed by the dignitary to whom that 'aid and advice' was given. Attention is to be drawn to the fact that the expression 'aid and advise' was used in a number of statutes which laid down the Constitution of some Dominions and which statutes were passed by the British Parliament, as far as for example, Section = 11 of the British North America Act, 1867 (30-31) (Victoria) Chapter 3 which read as:

" There shall be a Council to aid and advise in the Government of Canada to be styled the Queen's Privy Council for Canada".

Article 31.1 of the Constitution of Ireland (December 29, 1937) is worded similarly. It states:

" There shall be a Council of States to aid and counsel the President..."

The reason as to why it was not said that 'aid and advise' of the Council of Ministers shall be binding on the President of India is again in consonance with the constitutional practice. In legislation, out of respect, out of courtesy, such language was not used, and it was not said that 'This shall be binding on the President of India'

As a matter of fact the framers of the Constitution when they framed Article 71 (1) in the form in which it is found now they meant that the advice tendered by the Council of Ministers to the President would be binding on him. Replying to an amendment moved by Mr. Mohd. Tahir in the Constituent Assembly when Article 61 (1) - the present article 74 (1) - was being discussed, Dr. Ambedkar observed as follows:

" There is no case which can arise where the President would be called upon to discharge his functions without the advice of the Prime Minister of his Cabinet... Mr. Tahir has failed to realise that all that the President will have under the new Constitution will be certain prerogatives but not functions and there is a vast

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deal of difference between prerogatives and functions as such¹.

However, as doubts were expressed, whether the language of Article 74 (1) conveyed that the advice tendered by the Council of Ministers was binding on the President, even by the President of the Constituent Assembly, first in his letter of the 9th April, 1948² to Shri B.N.Rau, and subsequently in the Constituent Assembly itself while referring to an amendment moved by Sardar Hukam Singh in which he said that the President might promulgate ordinance after consultation with his Council

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1. Constituent Assembly Debates, Vol.VII, p.1158, Shri Mohd. Tahir's amendment No.1297.

" That at the end of Clause (1) of Article 61 the following be inserted:

" Except in so far as he is by or under this Constitution required to exercise his functions or any of them in his discretion".

2. Rajendra Prasad's personal papers. Inter alia, the President of the Constituent Assembly wrote in that letter:

" I felt intrigued by some provisions in the draft Constitution and should like to have clarifications."

I do not find any provision laying down in so many terms that the President is required to accept and act according to the advice tendered to him by his Ministers... Does this mean that the President is not bound by the advice of his Ministers at all in any case or that he is bound to act in all cases.

of Ministers, Dr. Ambedkar assured the President of the Constituent Assembly that if there was any such ambiguity that would be removed³. As a matter of fact it was seriously considered if it would be worthwhile to embody in the Constitution itself certain provisions, a sort of instrument of instructions, in order to describe the relationship between the President and his Council of Ministers and Dr. Ambedkar in that regard⁴. However, on second thoughts being given to it, the amendment was not moved. Subsequently when the question was raised by Shri H.V. Kamath in the Constituent Assembly on October 14, 1949, Dr. Ambedkar observed:

" No constitutional government can function in any country unless any particular constitutional authority remembers the fact that its authority is limited by the Constitution and that if there is any authority created

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3. It would be instructive to read the dialogue that took place in this regard between the President of the Constituent Assembly and Dr. Ambedkar.
 4. Amendment No. 3404 (vide printed list of amendments). This amendment sought to add a new Schedule after the Third Schedule as Schedule III-A. It was entitled 'Instructions to the President' and laid down in detail the manner in which the President would be guided in the exercise of his powers.

by the Constitution which has to decide between that particular authority and any other authority; then the decision of that authority shall be binding upon any other organ. That is the sanction which this Constitution gives in order to see that the President shall follow the advice of his Ministers, that the executive shall not exceed in its executive authority the law made by Parliament and that the executive shall not give its own interpretation of the law which is in conflict with the interpretation of the judicial organ created by the Constitution.⁵

To a specific question asked about the above observation of Dr. Ambedkar if in any particular case the President did not act upon the advice of his Council of Ministers, would that be tantamount to a violation of the Constitution and would he be liable to impeachment, Dr. Ambedkar observed:

'There is not the slightest doubt about it'⁶.

Shri Alladi Krishnaswamy Ayyar intervening in the above discussion stated the position more emphatically as follows:

... The point raised as to the necessity of a provision is entirely without substance. We have provided in Article 61(3) that the Council of Ministers shall be collectively responsible to the House of the People. If the President stands in the way of the Council of Ministers discharging

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

6. Ibid.

that responsibility to the House he will be guilty of violation of the Constitution and he will be even liable to impeachment. Therefore, it is merely a euphemistic way of saying that the President shall be guided by the advice of his Ministers in the exercise of his functions.⁷

Shri T.T.Krishnamachari also expressed a similar view in the Constituent Assembly on November 25, 1949. He observed:

'So far as the relationship of the President with the Cabinet is concerned, I must say that we have so to say completely copied the system of responsible government that is functioning in Britain today; we have made no deviation from that and the deviations that we have made are only such as are necessary because our Constitution is federal in structure... All the powers that are left to him are perhaps those in which there will be marginal use of discretion, perhaps when there happens to be a question of dissolution of the Parliament, that is the dissolution of the House of the People, the question of calling upon any particular person to form the Ministry and the question of dismissing the Ministry... In all these points, the conventions that have grown round the

7. Ibid., pp.270-271.

powers of the King of England in so far as his relationship with his Cabinet is concerned today are sufficiently strong for us to rest content with and there will be no misuse of those marginal powers by the President.⁸

Thus the framers of the Constitution had held that the President was bound by the advice tendered by his Council of Ministers except in certain 'marginal cases' such as the one relating to the dissolution of a Ministry or the House of the People or the appointment of the Prime Minister, when the picture was not clear. But as Dr. Ambedkar pointed out, such 'marginal cases' pertained to the prerogatives of the President rather than to the exercise of the functions of the President in the administration of the country. Even Shri K. Santhanam was participated during the discussion in the Constituent Assembly on Article 61 (of the Draft) held that the President was bound by the advice tendered by the Council of Ministers. He stated on December 30, 1948 as follows:

' It is said here that there shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.

That does not mean that normally the function of the

8. Ibid., Vol. XI, pp. 956-957.

Prime Minister is to aid or advise the President in the exercise of his functions. In fact, the position is altogether opposite or the reverse. It is thus the Prime Minister's business with the support of the Council of Ministers to rule the country and the President may be permitted now and then, to aid and advise the Council of Ministers⁹.

The President of India is one of the highest as well as the most enigmatical political officer in the world. There has been a great deal of controversy about the President's power and functions. As these depend on the constitution and to a very large extent on conventions which have never been precisely defined and are also subject to changes in accordance with circumstances; the controversy will have to go on until experience over a long period settles the issues. According to the legal interpretation of the Indian Constitution, the President, it is expected to play the following roles:-

First of all, he is the guardian of the Indian Constitution. Article 60 states " he has to take an oath or make affirmation that he will to the best of my ability preserve, protect, and defend ~~the~~ constitution and the law"¹⁰. It has

9. Ibid., Vol. VII, pp. 1155-56.

10. Article 60.

been argued that he would have to be confirmed to this oath of and on the advice of the Council of Ministers. If at any time, the President feels that any particular decision of the Union Cabinet is likely to undermine seriously the constitution. He is fully within his power to reject the advice. Naturally, before such rejection, he will discuss the matter with the Prime Minister and refer it back to the Council of Ministers. If the latter persists the advice; he will have to ascertain the opinion of the opposition parties in Parliament through various their leaders, or else according to his wish and desire. Ultimately, if he is still convinced that if he accepted the advice, he would be breaking his Oath, he will reject it and meet all the consequences.

The President is the Head of the Executive of the Union; Article 53 (1) says: " The Executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with his constitution"¹¹. The legal limitations to his executive power are the articles of the constitution itself. So long as he does not infringe any article, the exercise of his executive power can't be challenged in any court of law.

11. Article: 53 (1).

But Article 74 puts a political limitation by providing that:

" There shall be a Council of Ministers with the Prime Minister at the head to aid and advice the President in the exercise of functions"¹².

The same article further provides, " the question where any, and if so advice was tendered by Ministers to the President shall not be inquired in any Court"¹³. Therefore, it is not possible to argue that the words " aid and advice" have to be taken literally leaving the final decision to the President. The other extreme is the interpretation that it is only suphemism implying the British Convention that the advice of the Cabinet is final and conclusive and the President has only the ceremonial function of signing the documents on the dotted line and affixing his seal.

This latter interpretation has been prevelent for the last 20 years but it was due to the peculiar circumstances that a single party has had two-third majority for most of the time in both the Houses and until 1964, a strong highly popular leader, namely, Jawaharlal Nehru was Prime-Minister. It is often wondered, what would have happened if Jawaharlal Nehru had become President and Dr.Rajendra Prasad, the Prime

12. Article: 74.

13. Article: 74.

Minister. No doubt whatsoever the worlds " aid and advice " would have been interpreted at least to mean that the Council of Ministers would have to accommodate themselves to the views of President in matters in which he felt very strongly. Suppose the President is not anxious for a second term and rejects the advice on the ground that it will undermine the constitution or that it will gravely prejudice the interests of the Country, the only thing the Council of Ministers can do is to impeach him under Article 61.¹⁴ But if the President has acted on reasonsble grounds, he can be sure that no such impeachment, will be supported by a two-third majority of the total membership in each House of Parliament. The Prime-Minister may threaten to resign and create a political deadlock in which case, it will be open to the President to install a care-taker Ministry and dissolve the Lok-Sabha and explain to the people the reasons for rejecting the advice. If the same party is returned to Parliament in a majority and neither the new majority nor the President is willing to modify the conflicting views, the President may have to resign and leave to his successor to deal with the matter. Thus it is clear that a strong President who is prepared to give-up his office can ensure that his views are given proper attention by the Cabinet. The correct interpretation of the words " aid and advice " is that while the initiative to deal with

 14. Article: 61.

all matters of policy will be with the Cabinet and the Prime Minister, the final decision shall be such that the President can give his assent with honour and self respect.

There is also interpretation of the word " functions," which has gained attention, as there is no limitation, it has been interpreted to mean " all his functions " but Article 74 under Chapter I, Part V reads " The Executive"¹⁵. Therefore it may be legitimate to define the word "functions" to denote primarily his role as the head of the executive. Whether he should and to what extent accept the Council of Ministers " aid and advice " in other functions will have to be approached in an objective manner.

The third role of the President as the head of Parliament. The functions of the President in respect of Parliament are:

- a) " to summon it from time to time to meet at such time and place as he thinks fit,
- b) to Prorogue both Houses or either house,
- c) to dissolve the House of the People,
- d) to address either House of Parliament or both Houses,
- e) send messages to either House in respect of a bill or otherwise,

15. Article: 75.

- f) to assent, veto or return a bill with a message requesting consideration of such amendments as he may recommend, and;
- g) issue ordinances."

In all these matters, it is neither reasonable nor right to insist that the President should implicitly accept the advice of the Prime Minister. In respect of summoning of Parliament, the wishes and convenience of the members of the opposition are as important as those of the ruling party. Ordinarily, the ruling party itself through its whips and other means should take the trouble to consider the wishes of the opposition. The President will also have to consult the Speaker of the House of People and the Chairman of the Rajya Sabha.¹⁶ Hitherto, there has been a dominant ruling party and the Speaker and Chairman have belonged to that party. There may be times in which the Speaker does not belong to the ruling party and if in regard to the time for summoning the House, the Speaker and the Prime-Minister should have different views, it will be duty of the President to arbitrate between them and fix a date suitable to both.

A similar role will have to be played by him in reference to prorogation. With regard to dissolution, the President will have to consider whether an alternative Ministry can be

 16. Article: 85.

formed and if he can, he will be entitled to save the country from the trouble and expenses of a general election. In all these matters, British conventions can be accepted only in general indications of action to be taken in normal circumstances. They break-down in extra ordinary circumstances and in marginal cases.

This truth will be even more evident with respect to ordinances.¹⁷ Ordinances on non-controversial matters to tide over some temporary difficulty is something to which no President will demur but to take an extreme case, if the ruling party brings an ordinance to restrict the privileges and immunities of members of Parliament which can certainly be effected by regular legislation, it will be almost the duty of the President to refuse to sign such ordinance and ask the Government to go to Parliament. In the matter of vetoing a bill, it is almost ridiculous to say that he should be bound by the advice of a Ministry which sponsored it. On the other hand, if a bill has been passed by one Ministry which has been replaced by another before Presidential assent or veto is given, it will be absurd to say that the new Prime Minister can ask the President to veto the bill.

 17. K.Santhanam, Journal of Constitutional & Parliamentary Studies, Vol.III, No.3, July-Sept.69, p.3.

While all appointments to the Central Government are made in the name of the President, there are some high-offices which have to be appointed by him by warrant under his hand and seal. The Judges of the Supreme Court¹⁸ and the High Court¹⁹, the Governors²⁰, the Controller and Auditor General²¹ are among these. Can it be really contended that if the Prime-Minister should submit to the President names which the latter considers to be un-suitable, he should blindly sign the warrant ? He should take courage and refuse and ask the Prime Minister to think again. In the matter of the appointment of the Prime Minister, the President will have wide direction when there is no majority party or a strong coalition supported by a majority and a leader selected by it. There can be no convention that the leader of the biggest minority should be called as that minority may be opposed by all the rest as has happened in many states recently. The leader of a comparatively small minority may be more acceptable than any other and it will be the judgement of the President arrived at after prolonged consultation with various party leaders that will have to prevail.

Again, the President is ultimately, though indirectly the Constitutional head of every State, he appoints the Governor²²

18. Article: 124 (2).

19. Article: 217 (1).

20. Article: 155 (1).

21. Article: 148 (1).

22. Article: 155.

the former can instruct the latter to reserve bills for President's consideration, and when the State constitution breaks down, the President may have to declare Presidential rule under Article 356.²³

In all these matters, the President will have to take into account the fact that the Central Ministry may belong to a party different from that of the State Ministry and his duty is to protect self Government of the State as far as possible. His real role will therefore, be that of an umpire or arbitrator between the Union and State Governments. This will be particularly necessary of Presidential rule is sought to be prolonged unnecessarily. It is reserved to the last the role of the President as the Supreme Commander²⁴ of the Defence forces. It is a very delicate role and so long as he, the Prime Minister and the Council of Ministers are of one mind; there is no difficulty, but if the President feels strongly that the Union Government is rushing prematurely into a war or is dilatory in dealing with an invasion, he will be entitled to insist that the Parliament should have an opportunity to consider the matter before he accepts any decision of the Ministry.

In the appointment of the highest officers in the Defence forces, he can't escape the responsibility of rejecting

23. Article: 356.

24. Article: 53 (2).

unwise or improper selections. Thus, either the constitution or the British Conventions make the President. His power and influence will be proportionate on one hand to his strength and clarity of purpose and on the other to the circumstances in which he is called upon to exercise his judgement. Generally, he will abide by two rules. He will not interfere if the Ministry and the vast majority of Parliament are of one mind and he will also not try to take any positive action or make any particular improper appointments. We are entering a period in which unstable Ministeries, shifting party loyalties and unlawful activities are becoming more and more common. In such circumstances, the role of the President of India is sure to gain importance.

The guidance of wise and strong Presidents and in the States, of Governor is bound to become increasingly necessary. It is convinced that the Indian Constitution is elastic enough for this purpose. But equally in certain respects it lacks clarity at times of emergencies. Besides it has not tried to deal exhaustively with all the possible issues of conflict or differences of opinion that may arise between the President and Prime Minister and the Council of Ministers. But it is hoped enough to suggest that dogmatic assertions of the President's importance are not warranted in the near future. As stated above though the President of India, is a constitutional Head, conventions of U.K. cannot be made applicable in all ventures. An examination of the working of

the Indian Parliament compared to the well laid down conventional growth, it can be asserted that we have failed to evolve proper conventions. No one can disagree with the contention that we have accepted Parliamentary Democracy - considering the U.K. as mother of Parliamentary Democracy. The same cannot be accepted in context of Indian Parliamentary practice. One aspect which can be definitely stated is, Parliamentary democracy and healthy conventions go hand in hand, conventions have to vary from country to country; but as far as healthy conventions are grown. It is very aptly pointed " We have given anxious thought... and we want to emphasise the resided in the Ministry and in the Legislature and not in the President as such. At the same time we did not want to make the President just a more figure head. We did not give him any real power, but we have made his position one of great authority and dignity..."²⁵.

This shows that even the constituent Assembly has left ample scope for the President of India to play his role, It all depends on the conventional aspects, which is the great need of the hour to evolve such conventions to avoid a constitutional crisis.

25. Constituent Assembly Debates, Vol.VII, pp.635-636.