

## The President of India

In my farewell address to Members of Parliament, I stated that the President of India is not an appellate or supervisory authority over the Prime Minister and that the President is like an emergency lamp, which becomes active when power fails and becomes dormant when power is restored. I am not unaware that eminent jurists and occasionally leaders of political parties think differently and would wish the President to give an extended interpretation to his oath of office, namely to “preserve, protect and defend the Constitution and the law”. It is therefore, useful to examine the position of the President in the governance of our nation.

India deliberately chose the British model of parliamentary democracy. This is clear from the debates of the Constituent Assembly. Dr. K M Munshi one of the architects of the Constitution, explained the rationale for reaching the decision. He said, “Most of us and during the last several generations before us, public men of India have looked upon the British model as the best. For the last thirty-five or forty years, some kind of responsibility has been introduced in the governance of the country. After this experience, why should we go back on the tradition that has been built for over hundred years?” Many of the stalwarts of the freedom struggle have had education in England and had developed a fascination for the British parliamentary system. Besides, Britain was at that time a super power with an empire spread over the globe.

During the Constituent Assembly debates, Dr. Ambedkar repeatedly emphasized that we have chosen the British model of government. The most authentic statement regarding the nature of the Constitution came from Dr. Ambedkar when he moved for the consideration of the draft Constitution by the Constituent Assembly on 4<sup>th</sup> November 1948. He said, “A student of Constitutional law, if a copy of the Constitution is placed in his hands, is sure to ask two questions. Firstly, what is the form of *government* that is envisaged in the *Constitution* and secondly what is the *form of the Constitution*?” Answering the two questions, Dr. Ambedkar explained with extraordinary lucidity that “Under the draft Constitution, the President occupies the same position as the king under the English Constitution. He is the head of the state but not of the executive. He represents the nation but does not rule the nation. He is the symbol of the nation. His place in the administration is that of a ceremonial device or seal by which the nation’s decisions are made known... The President of the United States is not bound to accept the advice tendered to him by any of his secretaries. The President of the Indian Union will be generally (emphasis supplied) bound by the advice of his ministers. He cannot do anything contrary to their advice nor can he do anything without their advice. The President of the United States can dismiss any secretary at any time. The President of the Indian Union has no power to do so as long as his ministers command the majority in Parliament”.

A bird’s eye view of the Constitutional history of England establishes that the devolution of powers from the Crown to Parliament took place over centuries and even though every conceivable power has devolved on Parliament, yet the residue, if any, legally remains vested in the Crown of England. In contrast, the President of India is a creature of the Statute. He has only such powers and privileges as are granted by the Constitution: no more and no less. The Constitution defines the powers of the President, Parliament and the Judiciary and each has to act within the prescribed powers and limitations under the Constitution. There is no residual power vested in the President of India as in the Crown of England.

Furthermore, British conventions have been incorporated as express provisions in the Indian Constitution leaving not much of discretion with the President of India. A few examples may be cited.

The British conventions namely:

1. that the Crown must invite the leader of the party or group commanding the majority of the House of Commons to form the Ministry is embodied in Art. 75 that the President shall appoint the Prime Minister and that the Council of Ministers shall be collectively responsible to the House of the People.
2. that the Crown must appoint other ministers such persons as the Prime Minister advises, is embodied in Art. 75(1). Neither can the President refuse to appoint a person recommended by the Prime Minister nor appoint a person not recommended by the Prime Minister.
3. that the Crown is bound to exercise its legal powers in accordance with the advice tendered to her by the Cabinet through the Prime Minister, is found in Art. 74(1) of our Constitution.
4. that the Crown must assent to every Bill that may be passed by the Houses of Parliament is implied in Art. 111 as the power to withhold assent may be exercised only on the advice of the Council of Ministers.

Besides even before the 42<sup>nd</sup> amendment, the Supreme Court in *Shamsher Singh* case in 1974 held that the President was only a Constitutional head and was bound to act in accordance with the advice of the Council of Ministers. Ivor Jennings stated positively that “the President of India is essentially a constitutional monarch. The machinery of government is essentially British and the whole collection of British conventions has apparently been incorporated as conventions”. The foregoing narration clearly establishes that the powers of the President are no more and no less than, those of the British Crown.

A study of the statute law relating to a nation without the conventions will be incomplete and may lead to distortion. Constitutional conventions consist of various customs, practices, maxims and precepts of political ethics. Statutes and conventions together constitute the Constitutional Law of the land. The formal distinction that Conventions are not laws, though they are of importance from the legal standpoint also, is not of much relevance to the politician, the sovereign and statesman who regard the Conventions binding on them.

The most important function of the Crown in England and that of the President of India is the appointment of a Prime Minister. As Ivor Jennings said “The King has one, and only one function of primary importance. It is the appointment of the Prime Minister “. It is a well-established convention in both England and India that if after the general elections, a single party secures a majority of the House, its leader must be appointed as Prime Minister. As Ivor Jennings put it “ if a party secures a majority of the House and that party has a leader, that leader must become the Prime Minister”.

There are, however, a number of grey areas where the Constitution is silent on what the President should do as for instance when no party secures a majority in Parliament after the general election. In an essentially bi-polar party system as in Britain, one or the other party secures a majority and therefore there is no clear British convention in that regard. Such a situation arose in India after the general elections to the Union Government in 1989. The Congress though not the majority party was the largest single unit with Janata, BJP and others in descending order of strength. After the elections, the opposition parties agreed among themselves to support the Janata party from outside without forming a coalition. The issue

before the President was: who should be invited to form the Government. There was one precedent in Britain, though by no means a convention, where the Crown was faced with similar situation. In 1923, Baldwin, the Conservative Prime Minister advised the King to dissolve the House as he wanted to get a mandate from the people for his Tariff Policy and the Crown accepted it.

In the general elections, which followed in December 1923, the Conservative Government was defeated but still remained the largest single party with Labour and Liberals in descending order of strength. In these circumstances, King George V said, "If Baldwin wished to resign, he (the King) would refuse on the ground that he is still the head of the largest single party in the House of Commons". (Quoted from Baldwin by Montgomery Hyde p.197). When Baldwin was defeated in the House in January 1924 on the address to the throne, the King had the option either of calling Ramsay McDonald, the leader of the Labour party with 191 members or Asquith, the leader of the Liberal party with 159 members. The King invited Ramsay McDonald " as the leader of the next largest party in the Commons to form the administration " (Baldwin by Hyde p.199 and also Hood Philips Constitutional and Administrative Law 7<sup>th</sup> Ed. P. 320). The point to be noted is that the Crown called on the next largest party and did not attempt to divine whether the Labour or the Liberal party had the best chance of forming a stable government.

The Congress which was defeated in the polls in 1989 but which had the largest membership in the Lok Sabha did not stake its claim to form the government. Rajiv Gandhi realising the mood of the nation wisely decided not to press his claims. The President, following the British precedent cited above, called on the next party in order of strength namely the Janata party headed by VP Singh to form the government. When other political parties later met the President, he told them that he had called the next largest party to form the government and that it was for the other parties to demonstrate their support in the House. (vide My Presidential Years p. 275)

Some jurists have argued that the President's goal must obviously be to get a viable government and that he should be free to call any person who, in his opinion is able to provide one for the country. But neither the Constitution of India nor the British conventions envisage an active role for the President or the Crown in this behalf. They act as umpires rather than as promoters. The Sarkaria Commission while laying down guidelines for Governors in the choice of the party for forming the government said failing a party with absolute majority, a combination of parties which is able to command a majority in the House should be given the next opportunity. This proposition is unassailable if the combination of parties came into existence before the election and fought on one manifesto or one symbol. If the combination is formed after the election there is no mandate for it from the electorate. Besides, this introduces an element of subjective judgment on the part of the President and the Governor in the choice and exposes them to the charge of partisanship or biased decisions.

Occasions when no party had a majority in the State Assemblies and rival parties / groups competed for forming the government, had arisen in India pretty frequently. In such cases, some Governors had asked the claimants to parade before "them" their supporters or exercised subjective judgment as to which party commanded majority in the House. In my view, this procedure is both unseemly and unwise as in the former case it subjects Honorable members of the Legislature to the indignity of a parade and in the latter, subjects the Governor to a charge of bias and partisanship. On the other hand calling parties in order of their strength in the House will certainly be the most prudent and non-controversial course of action. Again in 1991 when

no party had a majority in Lok Sabha, the President invited the leader of the then largest single party, the Congress Party and on the acceptance of the responsibility by its leader appointed him as Prime Minister, a course that is clearly fair to all the parties. In 1996 and thereafter the country did not return a single party with viable majority and coalition governments had short-lived existence. Between 1996 to 1998 there were four governments at the Centre. I, therefore, suggest that a convention be established by Presidents and Governors to follow the practice of inviting parties according to their strength and allow the House to decide which party it would support.

Analogous to choosing the Prime Minister is the situation where coalition partners withdraw support to the government or ruling parties split and rival groups claim the right to form the ministry. The President or the Governor is urged by the respective parties to decide the relative strength of claimants. Lists containing the same names are sometimes provided by rival claimants and then personal verification by the Head of State is demanded. The Head of State who goes through these processes does not enhance the prestige of the high office. Nor are these procedures constitutionally correct.

Under the Constitution, the Prime Minister or Chief Minister is not required to possess a majority *of* the membership of the House; they have only to command a majority *of* members present and voting *in* the House. If the Head of State insists on support of the majority of the membership of the House, he would be palpably wrong. Whether the claimant commands majority in the House can be tested only in the House and not in the gardens.

In 1990, when the Bharatiya Janata Party, whose support ensured a majority in the House to VP Singh's Janata Party government, communicated to the President their withdrawal of support to the ruling party, the President did not take note of it. It was for the party, which alleged that the Government in office did not command majority in the House to prove the claim. As the House was not in session, the President asked the Prime Minister to summon the House and take a vote of confidence, to avoid a lame duck government continuing in office without summoning the House till the date of the statutory requirement under Art 85 (as it happened in the case of Charan Singh Ministry). Unfortunately, as some of the Governors did not follow that precedent, the chance of developing a convention was lost. I am happy that the issue was set at rest by the Supreme Court, in Bommai's case by approving the floor test in such cases.

The British convention that the Crown must in the exercise of its functions act in accordance with the advice of the Council of Ministers has been embodied in our Constitution in Art 74. As Ivor Jennings puts it "In nearly every case she (Queen) acts on the advice of Ministers". But in exceptional circumstances the Crown would be justified in refusing to accept such advice. Ivor Jennings mentions that "If Mr. Chamberlain had (as he would not have thought of doing) advised dissolution in May 1940 when Germans were invading Belgium, the King would have been justified in refusing". Thus the British Convention is flexible and provides for exceptional and remote possibilities. The use of the word "shall" in Article 74 may cause confusion. If "shall" is interpreted by Courts in the absolute sense without exception, situations such as one cited by Ivor Jennings may cause havoc to the nation. One may argue that such situations may not arise but law must provide for remote and improbable contingencies. In India the words in Art. 74 cl.(1) of the Constitution that the President shall act in accordance with the advice of the Prime Minister and Council of Ministers, if strictly interpreted, would leave no option to the President but to order dissolution of the House even in absurd circumstances cited by Ivor Jennings earlier.

Hood Philips in his book *Constitutional and Administrative Law* (7<sup>th</sup> Ed. Page 155) after setting out the two views concludes that a limited personal prerogative to the Sovereign (to refuse dissolution in appropriate cases) appears to be the better one. He adds that it is more in consonance with the traditions of British Parliamentary Government. According to him the reason for the general convention that the Sovereign is bound by the advice of her ministers is not applicable if they do not represent the wishes of the electorate (or Commons). Among the factors on which Sovereign could properly refuse dissolution would be whether the question in issue is of great political importance, whether supplies have been voted, whether there is a minority government, whether there is a war on etc. (Wade & Philips (1970) page 84, 120 De Smith (1973) page 104, 106 Hood Philips (1978) page 148, 149). But as stated in Halsbury, *Laws of England*, (4<sup>th</sup> Ed. Vol 8 para 938) the Sovereign has never refused to dissolve the House for over a hundred years. It is however conceivable that if the Prime Minister recommends dissolution of the House in the midst of a war, the Crown may decline.

Such contingencies are only remote possibilities. At the same time, the British practice of accepting the advice of the Prime Minister for dissolution of the House rests on the right of the Prime Minister to seek a mandate from the people against the decision of the House. It is not unusual for the House to be out of touch with public opinion and a fresh mandate may be necessary.

In 1991, when Prime Minister Chandrashekhar resigned without facing a vote of the House on the motion of Thanks, he sought dissolution of the House. Though technically Chandrashekhar was not defeated in the House, it was obvious that he did not have the support of the majority. In view of the fluid state of Constitutional Law on the issue, the President on that occasion relied on an additional factor for ordering dissolution namely, that no political party had staked a claim to form the government. The President in that case did not decide whether he was bound by the advice of the outgoing Prime Minister.

On the other hand, President Sanjiva Reddy while dissolving the House in 1979 relied on the advice of the then Prime Minister Charan Singh and it was so stated in the order of dissolution. President Reddy was severely criticized for accepting the advice of Charan Singh who had no mandate either from the people or from the House. It seems the British practice of accepting the advice for dissolution from the Prime Minister whether in office or defeated has stood the test of time.

The President's legislative powers namely of issuing proclamations of Emergency (Art. 352) or imposing President's rule (Art.356) always cause a political storm. It is well established that the President's satisfaction regarding the need for imposition of President's rule in a State is not his personal satisfaction but that of the Union Government's and the legality or propriety of the Government's action is justiciable. Yet the use of the words, "if the President is satisfied" creates in public mind the impression that the President is responsible for the decision.

Normally, the President acts in such cases in accordance with the advice of the Council of Ministers. The government is answerable for such acts to the parliament and to the judiciary. Affected parties however often approach the President to withhold his concurrence on some ground or other and the President is criticized for not responding to such requests. As I had mentioned earlier, the President is not an appellate or supervisory authority over the Prime Minister nor should he try to become a second centre of authority in the State. Secondly, if the President delays the acceptance of the advice and in the meanwhile the law and order situation deteriorates, the President is not answerable to the House but the government will have to face a serious situation.

If, however, the advice of the government suffers from a Constitutional infirmity or is otherwise flawed the President may return such advice for reconsideration by the Council of Ministers according to the Proviso to Art. 74 (1) of the Constitution.

On March 12<sup>th</sup>, 1991 the last day of the Lok Sabha the Minister for Parliamentary Affairs introduced a bill for pay, pension and perquisites of members and former members of Parliament. During the consideration of the bill, a Janata Dal member, Kabde moved an amendment to provide a proportionate amount to every member “who had served for a minimum period of one year”, and it was adopted. When the bill came for my assent, I found that the Amendment of Kabde was moved without the recommendation of the President as required by Art. 117(1) of the Constitution. The Article quoted above says that a bill or amendment to a Money Bill shall not be introduced or moved except on the recommendation of the President. As the Amendment of Kabde was moved without such recommendation the President said that he did not propose to give assent to the bill.

Recently President Shri K R Narayanan returned for reconsideration under the proviso to Art. 74(1) the Proclamation seeking to introduce President’s Rule in Bihar. He had given elaborate reasons for his decision. The Union Government wisely refrained from reaffirming its recommendation under the proviso to Art. 74(1) and ensured the smooth working of the Constitution. I am sure that healthy conventions will develop in course of time regarding the exercise of President’s powers under Article 352 and 356.

It is sometimes argued that in conformity with his oath of office to “preserve, protect and defend the Constitution” and the law, the President should intervene to prevent abuse of authority. This plea will have validity when the advice of the Prime Minister is contrary to the Constitution or norms of democracy enshrined in the Preamble to the Constitution. Administrative responsibilities must rest with the Prime Minister and the Council of Ministers. The British convention that the Prime Minister shall communicate to the Crown all important matters relating to the administration and furnish information sought by the Crown, has been enacted as Article 78 of the Indian Constitution. Even today the Prime Minister of England meets the Crown every week and communicates matters concerning the governance of the nation. The same system prevails in India also. The Prime Minister meets the President and freely discusses the matters relating to administration. The extent of the dialogue naturally depends on the personal equation between the two dignitaries.

Art 78 reads as follows:

It shall be the duty of the Prime Minister

- a) .....
- b) to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for
- c) .....

The use of the word shall as in the case of use of the word shall in Art. 74(1) may cause difficulties. Can the President call for prior information regarding budget proposals (apart from seeking recommendation of the President under Article 117(1) of the Constitution) or information of a high security or confidential matter? No constitution is perfect nor can any constitution anticipate all the problems that may arise in future. Such issues have to be solved by forging healthy conventions.

The British conventions regarding the functions of the Crown have been set out by Bagehot as follows: the Crown has “the right to be consulted, the right to warn and the right to encourage”. The President of India must be presumed to have the same rights as our system is modeled on the British form of Cabinet government. Delicate questions whether the President could exercise these rights in public or in the private meetings with the Prime Minister may arise and will have to be tackled with wisdom and foresight.

Another grey area that has arisen in the past and may have to be regulated by convention, is the binding nature of the advice of a Council of Ministers, which after resignation carries on the administration till alternative arrangements are made. The Constitution makes no mention of interim or caretaker Government. The letter of the law would seem to suggest that such Council of Ministers have the same rights and privileges as the normal Cabinet. But then, a ministry that has forfeited the confidence of the House and lost its mandate to govern cannot be equated with the ministry enjoying the confidence of the House.

In such a case the President has to ensure that a ministry functioning till alternative arrangements are made does not commit the future elected government to policy decisions or to heavy financial burdens. In 1992 when Chandrashekhar Government was continuing in office after resignation, the President advised the Prime Minister against certain proposals that would commit the future government to heavy financial liabilities. The Prime Minister accepted the advice thereby setting a healthy convention.

The foregoing analysis leads to the conclusion that the President of India under the Constitution and practices built up during the last 50 years has the same status and functions as the Crown of England, no more and no less. If some people want to vest more powers in the office of the President, it must be done after getting a mandate from the people through their election manifesto and by constitutional means and not by a wayward interpretation of the existing basic law.