

# THE PRESIDENT OF INDIA: A DE JURE HEAD OF GOVERNMENT

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## ABSTRACT

The constitution of India came into force on 26th November 1949. It has been referred to as “Lawyer’s constitution” or “Borrowed Constitution” many times. With 444 articles divided in 22 parts and 12 schedules, the constitution of India stands as the longest constitution in the world. On the basis of Montesquieu principle of separation of powers, the Constitution of India has divided its power into three organs (Legislature, Executive, Judiciary). Executive power in India according to Article 52 is vested in the office of President. But unlike the President of U.S.A or Russia, the President of India does not really have the same executive power. Article 74 of the Constitution talks about formation of a council of ministers, which advises the President. According to Article 74 President shall follow advice of the council of ministers. Surprisingly, the original draft of the constitution which came into force in 1949 gave more flexibility or power to the President as it did not use the word “shall”. But the 42nd and 44th Amendment brought quite a change to Article 74. Both of these amendments restricted the freedom of the President to use his/her powers. The position of President as of now is more of a notional. He can only use his powers on advice of the Prime Minister and his council. This really raises the question as to the need of having a President when he can only work on advice of the Prime Minister. The Office of President is based on the concept of monarchy of England and other European Countries. Though the cost of having a de jure head of government really makes a dent on Pocket of common people and also creates unnecessary complications.

**Keywords:** President, Article 52, Article 74, Constitution, Prime Minister.

## INTRODUCTION

Flipping through the pages of Constitution of India, 1950 bare act one can admire the hard work and time spent on crafting of this sacred document. Constitution signifies the struggle of independence which we had to endure for more than a century. All chapters of Constitution are carefully drafted to help not only in proper governance but also provide proper rights and protection to Citizens. But still there are some parts of Constitution which remain ambiguous and need more shedding of light. Chapter one Part V contains some of those Articles which need another look. Chapter 1 of Part V talks about the executive body of our constitution, that is President of India. The constitution of India like any other constitution of a democratic country has carefully divided its power into three bodies (Executive body, Legislative body and Judicial body). In an ideal scenario these three bodies should always function independent of each other without encroaching into each other's space. But if history has taught us anything that is that these ideal scenarios and theories only exist in papers and books. From 1976's 42nd amendment which limited powers of President to landmark judgement of Kesavananda Bharati by Supreme court. These incidents clearly indicate the power struggle between these three bodies.

But among these three bodies there exists one body whose existence has really baffled me since my primary school days. That is the President's office.

## CONSTITUTIONAL PROVISION RELATING TO PRESIDENT OF INDIA

The office of President is established under Article 52 of Constitution of India. Article 52 explains that there shall be an office of President. Whereas, Article 53(1) vests not only executive power of the Union in the hands of the President of India. But Article 53(2) makes him/her supreme commander of defence of the armed forces of the Union.

Anyone reading the above information may at first glance understand why the President is known as the head of union. But then why do so many of us call the President of India as a glorified rubber stamp?

Many of us have unfortunately heard the comparison of the President of India to a rubber stamp some time or other, either from our teachers, parents or peers. For me that happened during my primary school while studying about the structure of parliament for my summer holidays homework. “President in India is just a rubber stamp” said my uncle, who was helping me with my work. Even though I understood the meaning of that statement, complete understanding of those words only came after my enrolment at my law school.

## **42ND AMENDMENT**

I personally never really liked the direct comparison of the post of President with something like a rubber stamp. But to understand the origin of this comparison we need to focus on the 42nd amendment of 1976.

The original constitution of India came into force on 21st November 1949. In that original document, Article 74 which dealt with council of ministers contained the following words:-

1. There shall be a council of ministers with the prime minister at the head to aid and advise the President in exercise of his functions.
2. The question whether any, and if so what, advice was tendered by ministers to the President shall not be inquired into any court.

Reading the original clause 1 of Article 74 we can see the problem that was bound to happen. Clause 1 of Article 74 explains how the President needs to exercise his power on “advice” of the Prime Minister and council of ministers. That makes sense since the Prime Minister is someone who is elected by people during the Lok Sabha election. But the problem lied in the formation of the Article since the use of word “advice” clearly created certain ambiguity. As what will happen if President chooses not to adhere with advice of Prime Minister: the use of word “advice” didn’t really made advice of the council of ministers binding on the President.

Though this luckily never caused any major problems since the President was chosen by Prime minister and his council only.

But then came the 42nd amendment after which Article 74(1) read as following-:

1. There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.

Comparing this amended Article 74(1) with the one before the amendment, we can clearly see how the 42nd amendment made the advice by the Prime Minister and his council of ministers binding on the President. This really reduced the power and significance of office President by a significant amount and may very well be responsible for giving birth to the notion of comparison of President to a rubber stamp.

But some may wonder why after almost 30 years of independence the need for this particular amendment arose. The answer to this question lies in the events which transpired a year ago.

### **1975**

Even though the Bangladesh liberation war of 1971 lasted only 9 months. The war took its toll over the economy of India with negative GDP growth. So the next decade was crucial for the country. The country was seeing spiked unemployment rate and poverty. Also Indira Gandhi defeated Raj Narain in the general elections of 1971. Bitter by this defeat Raj Narain challenged the validity of the elections on ground of misuse of corrupt practices by Indira Gandhi. Ultimately Allahabad High court found Indira Gandhi to be guilty of malpractice during her election campaign. Meanwhile freedom fighter JP was leading a campaign against the government in Bihar and the campaign was gaining traction. All these events acted as catalysts for what transpired in 1975. Many consider the year 1975 as a dark phase of Indian politics. In this year Fakhruddin Ali Ahmed who was the fifth President of independent India, proclaimed national emergency on advice of then Prime Minister Mrs Indira Gandhi. This emergency stretched for 21 gruesome months and during this time Gandhi passed some questionable laws and amendments.

According to some reports it is said that even though Fakhruddin Ali Ahmed proclaimed national emergency on advice of Indira Gandhi, he was not happy with the actions of Gandhi and her family. It was the first time after independence that tension was brewing between the President and his advisers. This acted as a catalyst for amendment of Article 74, which greatly reduced the powers of the President and reduced him to the position of a mere puppet of the Prime Minister.

Though when the Janata Party came to power in 1977 with a landslide victory. The 44th amendment was brought which undo the effect of the 42nd amendment to a certain degree.

## **44TH AMENDMENT**

In a not so surprising turn of events after being in power for three decades, congress was defeated by the newly formed Janta party with Morarji Desai as Prime Minister. As one will expect the first step taken by this newly formed government was to undo the policies and procedures adopted by the previous Gandhi government. So Morarji Desai tried to repeal the 42nd Amendment. But since congress party still had a majority in Rajya sabha with 250 seats, Morarji Desai failed to do so. So 43rd and 44th Amendments were passed by Desai government,

The 44th Amendment was made to the constitution to nullify the effects of the 42nd amendment, which reduced powers of the Supreme and High court and as explained above also made the Prime Minister's advice binding on the President.

### ***Article 74 after 44th Amendment:***

Article 74-

Council of Ministers to aid and advise President:

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

(Provided that the President may require the council of Ministers to reconsider such advice, either generally or otherwise, and the President shall act in accordance with the advice tendered after such reconsideration)

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

Looking at Article 74 post 44th amendment we can clearly see that the new government of Morarji Desai despite promising in their election manifesto to restore the constitution to the state before the 42nd amendment chose not to do that completely. As they themselves realised the future problems it could have caused. Since restoring Article 74 to its original state would have once again made advice of the Prime Minister and his counsel not explicitly binding.

So instead they chose to add a Provided that sub clause in Article 72(1) and this sub clause gave the President one time power to require the Prime minister and council of ministers to reconsider their advice in time when the President finds their advice inconsistent with the constitution. But after reconsidering the advice if the same advice is once again given to the President then he has to act in accordance with such advice.

By observing the timeline of our constitution upto 44th amendment we can clearly see how the Position and power of the President has with time has been diluted by our legislative makers. The ambiguity created due to poor wordings of Article 74 in the original draft was completely removed by 42nd and 44th Amendment. But by doing so it also gave rise to the questions like do we really need a President? What is the need of an elected Nominal head when we have an elected Prime Minister? And is the President just a rubber stamp?

## **PRESIDENT OF INDIA??**

The President occupies a nominal position in India. Dr. Ambedkar who was the chairperson of drafting committee of constitution of India described the position of President with these words

“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 on a seal by which the nation's decisions are made known.”

It's not a mystery that most laws in India are based on common law. So it doesn't come as a surprise when the drafting committee chose to adopt the British hierarchy of Parliament with the President as nominal head. But they failed to consider the fact that even though Parliament of the United Kingdom has a King or Queen as nominal head, the reason for having that is completely different. Unlike India where the President is elected by collegium in the United Kingdom King or Queen belongs to the Royal Family. And this holds historic and sentimental value for many britishers at least for now. But in case of India at the time of Independence we had finally given up all the kings and badshahs and were in process of establishing a robust democratic nation. So it really didn't make sense to have a nominal head and a real head of country. We could have easily followed the steps of the United States to have one head of the state and in the process saved tons of money.

## **COST OF HAVING A PRESIDENT**

According to the Union Budget of 2020 the government earmarked around 81 crores for President's staff, household and allowances. The funds included yearly salary of Rs 60 lakhs of President and also included Rs 47.60 crore for expenditure on household expenditure and also Rs 32.78 crore for establishment and allied expenses. Though this dwarfs the \$86 million dollars spent by british government on the Royal family. Still in a country like India where average one day salary is around Rs 353 allocating 81 crores of Union Budget is a big thing.

Of Course, the above stated expenditure doesn't include tax payers money spent on security provided by the army and Delhi police, or cost of presidential foreign tours, or retirement perks.

After his retirement the President is entitled to lifelong pension of and various other privileges like-

- A pension of 50% of emoluments of President per month. That is Rs 250000 going by the current 500000 per month salary of the President.
- A well-furnished bungalow with free electricity, water and broadband facility. Along with the motor car.
- One lakh per annum for his private secretariat staff and peons.
- Free medical attendance and treatment anywhere in India.
- To travel anywhere in India by highest air, rail or steamer, and to be accompanied by at least one person during such travel.
- Special security by Delhi Police.

Some may argue that being a former head of the Union of India a President should be entitled to a certain lifestyle. I also agree with that argument. But where the average salary of a common person in India is just Rs 31,900 or \$424 does it make sense spending crores on someone holding a mere nominal position with no actual powers. Prime minister of India and his council is 100% capable of functioning and performing their duties even without having a nominal head. This raises the question as to the need of having a Presidential position.

## CONCLUSION

Even though our constitution makers did a great job in drafting our constitution. They, unfortunately inspired by British constitution and Parliament hierarchy, adopted the concept of having a position of an elected nominal head. The President of India sits at a position where despite being at top of hierarchy he cannot even exercise one percent of his power without advice of his council of ministers. Because he is mostly chosen by the Prime Minister and council of ministers we rarely see the President speaking or acting against the Prime Minister and his council, even when their advice may appear questionable or unfair.

Proclamation of National emergency in 1975 by then President on advice of Indra Gandhi serves as a prime example of such scenario. Where despite very well knowing and understanding the motives of then Prime Minister Indira Gandhi. President Fakhruddin Ali



Ahmed proclaimed emergency and helped Gandhi in gaining absolute power. Reading about the emergency scenario it almost felt like having a nominal position of President above the Prime Minister hardly even matters. Even the Governors and Lt. Governors even though serves at pleasure of the President are hand picked by the ruling political party to further their agenda in a particular state or union territory.

One of the main features of Law is that it should evolve with time and also reflect the current scenarios of our society. Also it should act as a way for correcting the past mistakes and issues. Same applies to our constitution also. As today the office of President feels like one of those mistakes that should be corrected by the law makers. Having a nominal head position to give assent to bills and signing of memorandums and other important documents only unnecessarily complicates the process of law. Since when was the last time you heard that a bill after being passed in parliament was not given assent by the President. This also puts enormous pressure on us taxpayers as explained above.

So finally I think time has come for lawmakers to really weigh the advantage or perks of having a position of nominal head. When even without such position our country like many others ( for example U.S.A ) is very well competent to function and thrive properly.