

PRESIDENT'S RIGHT TO SEEK INFORMATION UNDER ARTICLE 78 OF THE CONSTITUTION OF INDIA

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Abstract

The paper focuses on the working relations between the head of the state and that of the nation in the parliamentary democratic system. Despite being the constitutional head of the union government, the President can certainly influence the decision-making process of the government in some areas, though generally he is obligated to act on the aid and advice of the council of ministers, in the exercise of his powers and functions conferred upon him by the Constitution. Article 78 gives him the power to understand the actual decision-making process of the government. This is his discretionary power.

I Introduction

THE INDIAN Constitution has envisaged the parliamentary form of government, on the lines of the Westminster form of government prevalent in Britain in which the monarch is a constitutional head of the government and the real powers are vested in the cabinet headed by the Prime Minister. The President of India is the constitutional head of the union government and is obliged to act on the aid and advice of the council of ministers headed by the Prime Minister in the exercise of his powers and functions conferred upon him by the Constitution.¹ The advice tendered by the ministers to the President is beyond judicial scrutiny.² The executive power of the union is vested in the President.³ The President appoints the Prime Minister and on the advice of the latter he appoints other ministers.⁴ The ministers hold their office during the pleasure of the President.⁵ The council of ministers is collectively responsible to the Lok Sabha⁶ and not to the President. The

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1 The Constitution of India, art. 74(1).

2 *Id.*, art. 74(2).

3 *Id.*, art. 53(1).

4 *Id.*, art. 75(1).

5 *Id.*, art. 75(2).

6 *Id.*, art. 75(3).

7 R. Venkataraman, *My Presidential Years* 4 (Harper Collins Publishers India, 1994).

President is not an appellate authority over the council of ministers.⁷

In the constitutional scheme of things in the country, the real powers of the government are exercised by the Prime Minister and other ministers as per the business rules framed by the President on the advice of the Prime Minister.⁸ The President is always bound to have a council of ministers even if the Lok Sabha is dissolved. He cannot act without the advice of the council of ministers and if he acts without such advice he will be liable to be impeached under article 61 of the Constitution by the Parliament for violating the Constitution.⁹ But even in this type of constitutional scheme the President is not a rubber stamp or a glorified cipher. He is a "quiescent volcano".¹⁰ In some exceptional cases he can act on his own discretion, that is, without receiving any advice of the council of ministers¹¹ and can make difference in the decision-making process of the union government.

After the 42nd and 44th constitutional amendment acts, the President is obliged to act on the advice of the council of ministers in the exercise of his functions. But in some cases he can act on his own discretion. His right to ask the Prime Minister to furnish any information pertaining to the affairs of the union government under article 78 of the Constitution is also one of such areas where he can act on his own discretion. His right to get the information from the Prime Minister is said to have been borrowed from the unwritten Constitution of England. The President of India is compared to the constitutional position of the British monarch, stated in elegant terms by Walter Bagehot:¹²

To state the matter shortly, the Sovereign has, under a constitutional monarchy, three rights—the right to be consulted, the right to encourage and the right to warn. And a King of great sense and sagacity would want no others. He would find that his having no other would enable him to use these with singular effect. He would say to his (First) Minister: 'The responsibility of these measures is upon you. Whatever you think best must be done. Whatever you think best shall have my full and effectual support. But you will observe that for this reason and that reason what you propose to do is bad; for this reason and that reason what you do not propose is better, I do not oppose, it is my duty not to oppose; but observe what I warn'. Supposing the King to be right, and to have what Kings often have, the gift of effectual expression, he could not help moving his Ministers. He might not always turn his course, but

8 The Constitution of India, art. 77.

9 *U. N. R. Rao v. Indira Gandbi*, AIR 1971 SC 1002.

10 H. N. Pandit, *The PM's President-A New Concept on Trial* 3 (S. Chand and Company, New Delhi, 1974).

11 *Samsber Singh v. State of Punjab* (1974) 2 SCC 831.

12 Walter Bagehot, *The English Constitution* 113 (Chapman and Hall, 1867; republished by Fontana Press, London, 1991).

he would always trouble his mind.

The abovementioned observations can equally be applied in case of the President of India who is constitutionally empowered to be consulted, encourage, and warn the government under article 78 of the Constitution. As per the proviso to article 74(1) of the Constitution, the President can send the advice of the council of ministers back for reconsideration once but thereafter he is bound to act on the reconsidered advice of the council. It is up to the council of ministers either to accept his views or not. But sometimes, the reconsideration clause may prove to be of crucial significance and may result in avoidance of hasty action on the part of the council of ministers. In October, 1997, the Gujral government recommended the imposition of President's rule in Uttar Pradesh (UP) under article 356 of the Constitution, but the then President K.R. Narayanan sent the advice back to the council of ministers for its reconsideration. The reason was that the UP government headed by Kalyan Singh had just won a vote of confidence in the legislative assembly. The union cabinet headed by Prime Minister I.K. Gujral relented and decided not to pursue the matter further.¹³ President Narayanan again demonstrated his activism in 1998 when he returned the advice of the Vajpayee government which was imposing President's rule in the state of Bihar under article 356, but the government reiterated its stand in February, 1999 and the President signed on the proclamation. He also asked the Prime Minister to send the army in Gujarat during the 2002 riots but the government did not oblige him.

The President has a unique power under article 78 of the Constitution under which the Prime Minister is duty bound to furnish him any information which he seeks. Generally, the parliamentary government system, which the country has adopted, leaves very little scope for the President to affect the decision-making process of the government, a representative and elected government, responsible to the Parliament. However, the President can still make a difference by using his power under article 78 of the Constitution. No government can take him lightly. Gopal Krishna Gandhi has explained the President's role in these words:¹⁴

By the intent, language and scheme of the provisions of the Constitution of India, as well as by all subsequent pronouncements on the subject, the President is bound by the aid and advice of the government of the day. This, in other words, means that if the Prime Minister has made a proposal that requires the President to approve

13 "Cabinet reverses decision on President's rule in UP", *available at*: <http://www.rediff.com/news/oct/22up.htm> (last visited on June 20, 2015). Also see, Venkitesh Ramakrishnan and Praveen Swami, "A Crisis Defused", *available at*: <http://www.frontline.in/static/html/fl1422/14220040.htm> (last visited on June 20, 2015).

14 Gopal Krishna Gandhi, "When the President speaks" *The Hindu*, Oct. 7, 2013.

it, the President's approval is a desideratum, a mere formality. This, in a parliamentary democracy, is how it should be. But why does the Constitution require certain measures to be approved by the Head of State? For the reason that while the stamp of his approval is made of signet-rubber, the ink-pad on which it must press before the stamping, is the application of a non-partisan mind placed, consciously, at the final of our Constitution's architecture. The President is where he is for the reason that, placed above partisan interests, on a perch that helps him see the horizon beyond the field, he can provide the differential coefficient between the distant scene and the immediate, the far-effect rather than the instant, the climate rather than the weather, the year and the decade beyond the morrow. Where the government of the day, and the Opposition as well, are enmeshed in the species of an issue, he must see the genus. Where politics acts and reacts as political intelligence would, the President acts and reacts as political wisdom would.

These observations indicate that the President is not a rubber stamp. If he checks the public opinion and expresses his concerns to the government that it is violating the Constitution, the government cannot brush his views aside. It would have to take him seriously. The present paper examines the pros and cons of this power of the President in the light of different politico-constitutional developments in the country.

II Article 78 of the Constitution: An analysis

Article 78 of the Constitution empowers the President to be informed about the affairs of the union government which is collectively responsible to the Lok Sabha, the lower house of the Parliament. This article empowers the President of India to exercise his rights to be consulted, to encourage and to warn the government in certain cases. As stated earlier, though the President is the constitutional head of the union government (who is required to act on the aid and advice of the council of ministers headed by the Prime Minister in the exercise of his powers and functions conferred upon him by the Constitution),¹⁵ the President has some discretionary powers which he can exercise on his own, that is, without receiving any advice of the council of ministers. It appears that article 78 is also one of such powers which empowers him to ask the Prime Minister to furnish any information relating to the affairs of the union government. Article 78 is independent of article 74(1) of the Constitution. In other words, the council of ministers cannot advise the President about his rights under article 78. What kind of information the President needs, it has to be worked out by him alone and not by the council of ministers.

¹⁵ The Constitution of India, art. 74(1).

Clause (a) of article 78 of the Constitution makes it clear that though the President takes no active part in the formal deliberations of the council of ministers, he is constitutionally entitled to observe the conduct of the minister and the government. For these purposes decisions of the council of ministers relating to the administration of the affairs of the union and proposals of legislation must be communicated to him on his demand. The council of ministers which is collectively responsible to the Lok Sabha¹⁶ is principally and primarily concerned with the administration of the affairs of the union and only marginally with affairs which may not be related to the affairs of the union.¹⁷ It is the principal policy-making body of the union government which is headed by the Prime Minister.¹⁸ The council meets regularly for taking various decisions and its decisions are subject to approval of the Parliament. If the Parliament disapproves its decisions, it would have to go out of office because it can stay in power until it enjoys the support of majority in the Lok Sabha.¹⁹

The overwhelming bulk of administrative work of the union government is conducted in writing, so that a record is kept for immediate and future reference. A well ordered government cannot carry on if important matters are left to oral discussions and decisions which are not reduced to writing. The word 'cabinet' is not mentioned in article 74(1) of the Constitution. It is only the council of ministers which is mentioned in the Constitution. The cabinet is the superior class of ministers in the country who are independent heads of their ministries/departments. It is basically borrowed from the unwritten British Constitution. It may seem surprising that till Lloyd George became the Prime Minister of England, no record was kept of what happened at cabinet meetings, except that the Prime Minister in his letter to the King recorded what had happened. This was found unsatisfactory, and after Lloyd George became the Prime Minister, there has been a cabinet secretariat which, among other things, records the minutes of what happened at cabinet meetings or at meetings of cabinet committees. In our country, we have a cabinet secretariat which looks after the records of the cabinet and its committees. It functions under the supervision of the cabinet secretary who reports to the Prime Minister. The President of India is, therefore, entitled, as is the King of England, to send for the files, telegrams, telexes and the like in which the decisions of the ministry relating to administrative affairs are recorded as also relating to the administration of the affairs of the union.²⁰ The Prime Minister is duty bound to send him such documents.

16 *Id.*, art. 75(3).

17 *Id.*, art. 356.

18 *Id.*, art. 74(1).

19 *Supra* note 11.

20 H. M. Seervai, II *Constitutional Law of India* 2053 (Universal Law Pub. Co. P. Ltd, Delhi, 4th edn., 1996).

In all matters pertaining to union administration including article 78, the formal channel of communication with the President is the Prime Minister because he is the real head of the union government. The Prime Minister and other ministers are collectively responsible to the Parliament and not to the President. The President is not an appellate authority over the Prime Minister.²¹ Under clause (b) of article 78, it is the duty of the Prime Minister to furnish such information relating to the union government and legislative proposals as the President may call for. Whereas all decisions of the council of ministers must necessarily be communicated to the President, any other information relating to the administration or legislation is only to be furnished on the request of the President. It helps him to understand the working of the government properly as he does not chair the cabinet meetings. The cabinet meetings are always chaired by the Prime Minister or any senior minister in the absence of the former and the minutes and decisions of the cabinet meetings are communicated to the President. For conducting the meeting of the cabinet no prior approval of the President is required. But the cabinet is supposed to take its decisions in accordance with the Constitution and the laws. The omissions and commissions of the cabinet are obviously subject to scrutiny by the Parliament which has the power to make or unmake it. The cabinet is not responsible to the President though it is appointed by him. The cabinet takes all major policy decisions and thereafter communicates them to the President. The President can only encourage the cabinet to revisit its decisions.²² But thereafter he is bound to act on the reconsidered decisions of the cabinet.

Clause (c) of article 78 expressly affirms an important aspect involved in the doctrine of collective responsibility. The Prime Minister and other ministers are collectively responsible to the Lok Sabha for all decisions of the council of ministers and resign if the house disapproves any of their decisions. If any minister disagrees with any decision of the council of ministers, he may resign and if he does not resign and continues to remain a member, he cannot say in the Parliament or outside, that he is in disagreement with a decision of the government. He is required to support the decisions of the cabinet. If he does not, the Prime Minister can recommend his removal from the council of ministers to the President who is bound to oblige the Prime Minister.²³ The Prime Minister is the master of the ministers and not the President. For the successful working of the rule of collective responsibility therefore, it is absolutely necessary that a minister should not make a statement of policy or take any important action on his own responsibility and without the previous approval of

21 *Supra* note 7 at 4.

22 *Supra* note 11.

23 *Supra* note 7 at 4.

the council of ministers. The President can strengthen the collective responsibility of the council of ministers by asking the Prime Minister to reconsider any legislative proposal or decision of the government.²⁴

The collective responsibility of the ministers brings out accountability in the government. Jennings has stated that the doctrine of collective responsibility involves three things. *Firstly*, the Prime Minister is frequently in a position to pledge his colleagues' support because the only alternative is his resignation. *Secondly*, a minister should not announce a new policy without cabinet's consent but if he does so, the cabinet must either support him or accept his resignation. *Thirdly*, a minister ought to be chary about expressing personal opinions about future policy except after consultation. Any statement in advance of the cabinet decision is dangerous to the stability of the government. Accordingly, to maintain the doctrine of collective responsibility, clause (c) of article 78 of the Constitution empowers the President to require a matter, on which a decision has been taken by a minister, but it has not been considered by the council of ministers, to be submitted to the council of ministers for its consideration.²⁵ If the cabinet does not approve the decision of any minister/ ministry, the President can refuse to accord his sanction to such decision. No minister can bypass the cabinet or the Prime Minister. If anybody overrides the cabinet, the Prime Minister can recommend his removal to the President and the latter is obliged to do so. Even the Prime Minister is not an exception. If he takes any decision without consulting the cabinet the President can ask him to submit the same for consideration of the cabinet particularly the recommendation pertaining to the imposition of national emergency.²⁶

The right of the President under article 78 is very important which brings out transparency and accountability in the government. It is the constitutional duty of the Prime Minister, if the President so requires, to submit for 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 of ministers. But this provision is not certainly intended to authorize the President to reopen any decision already taken by the council of ministers.²⁷ The President can only encourage the Prime Minister to reconsider the decision and thereafter he is bound to act on the ministerial advice for approving such decision.²⁸

24 M.P. Singh, *V. N. Shukla's Constitution of India* (Eastern Book Company, Lucknow, 12th edn., 2013).

25 *Ibid.*

26 The Constitution of India, art. 352(3).

27 *Supra* note 24 at 439.

28 The Constitution of India, art. 74(1) proviso.

It is the Prime Minister whose voice shall prevail over the President ultimately.²⁹ But by exercising his right under article 78 of the Constitution, the President can certainly influence the decision-making process of the government. He can guide the government. No government can take him for granted. The requirement that the Prime Minister should communicate proposals for legislation and furnish such information as the President may require relating to the proposals for legislation is obviously designed to enable the President to advise and/or warn the council of ministers about provisions which appear to him to violate the Constitution, or provisions which may create damaging controversy in the country. No doubt the council of ministers is free to disregard his advice but if the President commands respect from the council by reason of his personality, character and the soundness of his judgment, the council cannot lightly disregard his advice, and even if the council does not give up its proposals, it may modify them.³⁰ So, the President can make a difference in the scheme of things by exercising his right under article 78 of the Constitution. His sole duty is to protect the Constitution and the laws as per the mandate of his oath taken under article 60 of the Constitution.

III Judicial response

As stated earlier, now after *Samsber Singh v. State of Punjab*³¹ (hereinafter, *Samsber Singh case*) and the 42nd and 44th constitutional amendment acts, it is well-established that the President of India is a constitutional head of the union government who is generally obliged to act on the aid and advice of the council of ministers in the exercise of his constitutional powers and functions³² except in a few areas where he can act on his own discretion. However, as no time limit is prescribed in the Constitution during which he has to act on the advice of the council of ministers, he can put any ministerial decision/proposal on hold for an indefinite period of time and can certainly delay the decision of the council of ministers. But it all depends on the personality of the individual who holds the highest constitutional office of the country. Generally, there is less chance of conflict between the President and the Prime Minister and a conflict between these functionaries is not in the interest of the democracy. Article 78 provides a platform to minimise such conflicts, if any.

Despite the abovementioned position, it is equally well-settled that the President has some discretionary powers which he can exercise independently of the advice of

29 *Supra* note 19.

30 *Supra* note 20 at 2054.

31 *Supra* note 11.

32 The Constitution of India, art. 74(1).

the council of ministers and his right to ask the Prime Minister for furnishing him any information about the ministerial decisions or proposal under article 78 is covered in that category. Article 78 confers a prerogative upon the President to be informed- again a well-established convention of the British Constitution, about the working of the union government. In *Samsber Singh case*,³³ the Supreme Court has also affirmed this position clearly. Delivering a concurring judgment in that case, V.R. Krishna Iyer J observed as follows:³⁴

The President in India is not at all a glorified cipher. He represents the majesty of the State, is at the apex, though only symbolically, and has rapport with the people and parties, being above politics. His vigilant presence makes for good government if only he uses, what Bagehot described as, the right to be consulted, to warn and encourage. Indeed, article 78 wisely used, keeps the President in close touch with the Prime Minister on matters of national importance and policy significance, and there is no doubt that the imprint of his personality may chasten and correct the political government, although the actual exercise of the functions entrusted to him by law is in effect and in law carried on by his duly appointed mentors. i.e., the Prime Minister and his colleagues. In short, the President, like the King, has not merely been constitutionally romanticized but actually vested with a pervasive and persuasive role.

Krishna Iyer's J instant erudite observations clearly indicate that the President is fully empowered to ask the Prime Minister to furnish him any information pertaining to the affairs of the union government and the Prime Minister is duty bound to oblige him under article 78. What information the President needs, it has to be decided by him and not by the cabinet. This power helps him to influence the decision-making process of the union government indirectly. He can frankly express his views on any decision or proposal of legislation initiated by the government. But it is all a confidential process between him and the Prime Minister, immune from any judicial scrutiny.

V Is there any remedy against the breach of Prime Minister's duty under article 78?

The nature of the duty imposed on the Prime Minister by article 78 cannot be described by merely looking at the language of article 78. That duty has to be discharged in the day-to-day working of the government and the political atmosphere in which

33 *Supra* note 11.

34 *Supra* note 19 at 877.

that duty has to be discharged must have a direct impact on the discharge of that duty. Is the duty laid upon the Prime Minister to do the things set out in article 78(a), (b) and (c) subject to any exceptions by necessary implication? This question assumed political importance after the Indian Express, a daily newspaper with a wide circulation throughout India published a letter written by President Zail Singh to Prime Minister Rajiv Gandhi complaining that he had not supplied the President with the documents relating to what came to be known as the "fairfax affair". The President later repeated that complaint which was given wide publicity. In his letter the President narrated the specific instances in which, despite his repeated demands, no information was supplied to him by the Prime Minister. This, in other words, was a sort of an indictment from the head of the state against the head of the government. Since then, what has been called the "Bofors case" has blown up.³⁵ President Zail Singh virtually accused the Prime Minister of ignoring his duties provided in article 78 of the Constitution. This certainly was a serious allegation against the Prime Minister which reflected the violation of the Constitution by the Prime Minister.

This incident created a constitutional crisis in the country and also generated public interest in the respective functions, rights and duties of these two constitutional functionaries. Apart from the high drama involved in the scenario in which one constitutional functionary made a public or publicized accusation against another constitutional functionary, alleging the violation of the Constitution, the controversy aroused many a constitutional, legal and journalistic pundits to offer their views on it. Most of them seem to have proceeded on the assumption that the President has a right to be informed by the Prime Minister. Some of them tried to analyze and examine the nature, extent and implications of this duty of the Prime Minister to keep the President informed.

It is a matter of fact that the Rajiv Gandhi government did not supply any such information to President Zail Singh as it doubted the intention of the President. The government linked article 74(1) with article 78. The government had an impression that the President might pass on the information to the opposition parties which were raising the issue openly and were targeting the Prime Minister. Before this, no such controversy had taken place in our country. Finally, the government did not supply any such information to the President and consequently a big controversy arose pertaining to the ambit of article 78.³⁶

35 *Supra* note 20 at 2054.

36 Giani Zail Singh, *Memoirs of Giani Zail Singh: The Seventh President of India* 255 (Har Anand Publications, New Delhi, 1997).

Now the question arises what is the remedy available to the President if the Prime Minister breaches his duty under article 78 and refuses to supply him any information, as Rajiv Gandhi did?

If the Prime Minister violates his duty under article 78 no sanction is prescribed in the Constitution. It is well-known that the Prime Minister holds his office so long as he commands the support of a majority in the Lok Sabha as per the mandate of article 75(3) of the Constitution. A vote of censure or a no confidence motion is a recognized method of determining whether the Prime Minister and the council of ministers have the support of the majority of the members of the Lok Sabha, to which the council of ministers is collectively responsible.³⁷ There is no provision in the Constitution for the removal of the Prime Minister for breach of his duty. But our parliamentary procedure enables questions agitating the public mind to be brought before Parliament. It is true that if the council of ministers and the party to which it belongs have an overwhelming majority in the Lok Sabha, it would be difficult to remove the Prime Minister, but that is a consequence of the cabinet form of representative government. Even so, public opinion and the opinion expressed by the press in the country and outside it, do influence a government because the party in power would not wish to lose at the next general elections.³⁸ It is, therefore, submitted that for an alleged breach of article 78 the remedy is political and not legal. The public opinion can certainly create problems for the government.

It is submitted that despite all this the President is not without options. He can inform the Parliament about the alleged breach of article 78 by the Prime Minister. He is the highest constitutional functionary of the country. The Parliament is fully competent to discuss such matter. The President is an integral part of the Parliament and it is believed that the Parliament will save the honour of the President. However, the eminent constitutional law scholar, H.M. Seervai doubts this contention and argues that the President's address under articles 86(1) and 87(1) are part of his functions, and although he is entitled to be consulted to have his objections considered, in the end he must give way, and he cannot disclose anything in his address to the Houses without the advice of his council of ministers. Seervai also argues that the President has to exercise his power under article 78 on the advice of the cabinet under article 74(1) of the Constitution. But this is too legalistic a view and does not merit any practical acceptance. If this view is accepted, it will frustrate the very purpose of article 78. Against a government which violates the Constitution, the President

37 The Constitution of India, art. 75(3).

38 *Supra* note 20 at 2197.

can certainly disclose the matter to the Parliament which is empowered to make/unmake that government. The courts of law do not have any role in this matter as the correspondence between the President and the Prime Minister is covered under privileged class and is protected by article 74(2) of the Constitution. The Parliament is fully competent to take the necessary action in that matter and the President can certainly raise that issue in the Parliament.

It is submitted that the President addresses the Parliament as per the constitutional scheme, that is, on the advice of the government of the day and the address which he delivers to the Parliament is prepared by the government. It is obviously sent to him for his comments but ultimately he has to accept the views of the government. This is based on the constitutional conventions which we have inherited from Britain. In exceptional cases, the President can certainly criticize the government if it violates the Constitution and can disclose that matter to the Parliament which comprises different parties. Even if the government holds a strong majority support in the Parliament, the President can still criticize the government if he commands respect in the country. Impeachment of the President is not an easy task. The controversy can put the government in trouble and the President has always an option to resign if he does want to sign on some unconstitutional decision of the government. He is not bound to accept the unconstitutional advice of the government keeping in view his duty to protect the Constitution under article 60.

V Constitutional application of article 78

The President does not participate in the decision-making process of the cabinet but by exercising his right under article 78, he can influence the decision-making process of the government indirectly. He can guide the government to run the administration as per the Constitution. If the government wants to take any action which does not fit within the constitutional framework, the President can warn the government not to take that step. Under the second provision of article 78, the President can ensure collective action within the council of ministers in those matters which, in his discretion, he thinks as deserving of such action. The government is supposed to take the President seriously.

Since the commencement of the Constitution, the matter pertaining to article 78 never came into controversy and the relations between the President and the Prime Minister remained cordial. The Prime Minister briefs the Presidents timely on all aspects pertaining to the affairs of the union government and also provides him the required information. In fact, generally the Prime Minister goes to see the President at *rashtrapati bhawan* and briefs him about the various affairs of the government. As mentioned earlier, it is only in 1986-87 that the question pertaining to article 78 came up sharply when President Giani Zail Singh had sought some information

from Prime Minister Rajiv Gandhi about the Bofors gun deal matter. Prime Minister Rajiv Gandhi refused to furnish any information to the President related to the Bofors matter. Prime Minister Rajiv Gandhi in his reply to the President explained at some length the scope of articles 74 and 78 of the Constitution and expressed the government's inability to give him such information on the matter than what was already furnished. He pointed out that the government did not hold the view that the President had an absolute right to know everything including classified information which was not known even to the Prime Minister or the defence minister. A year earlier when the President had sought a copy of the report of Thakkar Commission (which enquired into the disturbances in Delhi following Prime Minister Indira Gandhi's assassination), the President was told that "he had no absolute right to know under article 78."

On the other hand, President Zail Singh stated that his right to get information from the Prime Minister was independent of his powers which were to be exercised on the aid and advice of the council of ministers as per article 74(1). President Zail Singh explained the position of article 78 in the following words:³⁹

It appeared that Rajiv Gandhi's Government was confusing the supply of information under article 78 to the aid and advice under article 74 of the Constitution. The Prime Minister was conveniently overlooking the fact that if the President's right to seek information was to be governed by the discretion of the Government, then the founding fathers would not have felt the need for incorporating article 78 in the Constitution. In case the President sought a clarification or asked for a report on any matter of State, it would not restrict the advice of the Government. PM did not seem to realise that articles 74 and 78 were not mutually restrictive or contradictory. If the President chose to exercise his right to call for any information, the Government could not deny such information. How could the Government assume that for exercise of his right under article 78(d) of the Constitution, the President was expected to act on the advice of the Council of Ministers? The Government were obviously turning their face away from the fact that failure on their part to comply with the President's request under article 78(b) would constitute a violation of the constitutional provisions and also a breach of the oath taken by every member of the Council of Ministers at the time of occupying office that he would bear the faith and allegiance to the Constitution and act in accordance with the Constitution.

39 *Supra* note 36 at 256-257.

It is pertinent to mention that the stand taken by President Zail Singh was correct from constitutional law point of view. It seems absurd that the President will take the advice of his council of ministers before taking any information from the Prime Minister who is the head of the council of ministers. It is quite obvious that the council of ministers will never agree to furnish any information to the President which affects it adversely. If the President is bound by the view of the council of ministers in terms of article 78, it will frustrate the whole purpose of this article.

It is noteworthy that President's right to call for information is central to his function under the Constitution, to persuade the council of ministers and state all his objections to any proposed course of action and to reconsider the matter as he is the guardian of the Constitution and has to protect the Constitution and the laws.⁴⁰ He has full right to know how the government is running and what decisions are being taken by the cabinet. If he fails to protect the Constitution, he can be impeached by the Parliament under article 61 of the Constitution.⁴¹ However, he has to accept the final view of the council of ministers. But this view should not be unconstitutional. The demand for information is a feedback needed to fulfill the obligations of his office. How can the President encourage, caution or warn the government or require it to review or reconsider its decision without full knowledge of the facts of the case? The British model on which we have adopted the constitutional provisions regulating the relationship between the President and the Prime Minister is very clear in this respect. There, as A.B. Keith says, one clear rule is that the monarch is entitled to the fullest information in any sphere in which he has indicated desire to be kept informed. Walter Bagehot described the function of a constitutional monarch as one which gives him the right to be consulted, the right to warn and the right to encourage.⁴²

The President of India like the British monarch, by virtue of his constitutional position, has a pervasive and persuasive role. And, this onerous role cannot be fulfilled unless and until he gets full information about the union government from the Prime Minister. As stated earlier, in *Samsber Singh* case,⁴³ Krishna Iyer's J has clarified the importance of President's right under article 78 of the Constitution. No prudent Prime Minister would violate this constitutional duty and will furnish the required information to the President. The relationship between the President and the Prime Minister is constitutionally dignified, cooperative and harmonious and for smooth

⁴⁰ The Constitution of India, art. 60.

⁴¹ *Supra* note 20 at 2197.

⁴² *Supra* note 11 at 103.

⁴³ *Ibid.*

working of the democracy it needs to be maintained properly. It envisages no clash between them. For, it is not in the interest of the country if the high constitutional functionaries are at loggerheads. The Prime Minister has to respect not only the office of the President, but also the views of the person who for the time being holds the office. Similarly, the President has not only to respect the office of the Prime Minister but also the policies, programmes and directions pursued by him and his government so long as he has the confidence of the Lok Sabha which reflects the will of the people who are political sovereign. The country is governed by the parliamentary system, and not by the presidential system of American type.⁴⁴

The President should always keep in mind that the Prime Minister is the real head of the government who is responsible to the Parliament, and not to him. However, he can certainly guide him as and when the Prime Minister seeks his help. In order to facilitate this aim, article 78(b) of the Constitution provides that it shall be the duty of the Prime Minister “to furnish such information relating to the administration of the affairs of the Union and proposals for legislation as the President may call for.” The Prime Minister must fulfill this duty and should provide all necessary information to the President which he demands. Unfortunately, Rajiv Gandhi government did not follow this mandate which gave our democracy a bad name. Not only the media of the country but international media also took the note of this episode.⁴⁵

The failure of Prime Minister Rajiv Gandhi to furnish information to President Zail Singh created a constitutional crisis in the country and rumours spread fast that the President was planning to dismiss the government.⁴⁶ Besides article 78, there had been too much misunderstanding for a long time between Rajiv Gandhi and Zail Singh on various issues such as Punjab militancy, Indian Postal Amendment Bill, 1986 *etc.* Zail Singh was also unhappy over the incidents of riots against Sikhs in 1984. He had blocked the passage of the Postal Bill when he put the same in his cupboard for a long time without taking any action on that.⁴⁷ The bill was alleged to have violated the right to privacy of the people. The bill was later withdrawn by the V.P. Singh government in 1990.⁴⁸

⁴⁴ *Supra* note 9.

⁴⁵ “India’s President Confronts Gandhi” *New York Times*, Mar. 15, 1987, available at: <http://www.nytimes.com/1987/03/15/world/india-s-president-confronts-gandhi.html> (last visited on June 13, 2015).

⁴⁶ D.D. Thakur, *My Life and Years in Kashmir Politics* 115 (Konark Publishers, 2005).

⁴⁷ Fali S. Nariman, *The State of the Nation* 211 (Hay House, 2013).

⁴⁸ *Ibid.*

Seervai takes a different view and states that the President has to exercise his power under article 78 on the advice of the council of ministers. He argues that the information which the President requires is for the purpose of discharging his duty to the council of ministers and not for the purpose of disclosing or allowing his office to disclose, official secrets prejudicial to the council of ministers or of such a nature as would tend to bring out the defeat of the government. Seervai was writing in Zail Singh's context. He said that the fact that during the 36 years in which the Constitution had been in force, no public complaint was made, and no public controversy was raised, by any President that he had not been supplied with relevant correspondence and/or information. This shows that given goodwill and good faith on the part of the President and the Prime Minister, the duty imposed upon the Prime Minister by article 78 can be discharged, notwithstanding the differences of opinion which may exist between the President and the Prime Minister. The question remains: what happens if the Prime Minister has come to know, or has reason to believe, that the information sought by the President is to be used to discredit his government and to assist the opposition, if not directly, then, through the President's office? It is said that the English convention embodied in article 78 postulates, that it is not open to the British monarch to disclose official secrets outside the official hierarchy. Although the sovereign can meet leaders of the opposition with the permission of the Prime Minister in order to ascertain questions of fact or the real opinion held by them, the sovereign cannot meet the opposition leaders to secure the defeat of the government.⁴⁹

It is submitted that the plea of confidentiality cannot be accepted against the President of India, the head of the union. He must be trusted and if the government has sufficient reason to believe that the information which the President has sought or received will be used to discredit it, it should bring impeachment motion against the President for violating the Constitution. And it cannot simply refuse to supply the information to the President. The President is the supreme commander of the armed forces of the country and holds a dignified constitutional position. The government cannot doubt the credentials of the President who is the highest constitutional authority of the country.

Article 78 of the Constitution is a good device which maintains communication between the President and the Prime Minister which ultimately

49 *Supra* note 20 at 2057.

strengthens the constitutional supremacy in the country. Besides Zail Singh, some other Presidents of our country also utilized this constitutional device for getting information from the Prime Ministers on key issues which affected the state of governance in the country. President K. R. Narayanan wrote to Prime Minister Atal Bihari Vajpayee in 2002 and directed him to stop the riots in Gujarat with the help of army though the government did not oblige the President.⁵⁰ Narayanan's stand was much appreciated by the media. He twice returned for reconsideration questionable union cabinet decisions. In October 1997, the Inder Kumar Gujral government was forced to reconsider its decision to dismiss Uttar Pradesh Chief Minister, Kalyan Singh, and in September 1998, deferring to the President, the Vajpayee government went back on its decision to dismiss the Rabri Devi government in Bihar. President Narayanan used his powers under article 74(1), proviso of the Constitution along with article 78 and saved two governments from the draconian article 356. He demonstrated a unique presidential activism.

VII Regular communication between the President and the Prime Minister is necessary

Article 78 is a constitutional device to maintain regular communication between the President and the Prime Minister which helps the government to take right decisions as per the constitutional provisions. When such communication is regular, systematic and on a face-to-face basis, there shall be no chance of any conflict between them. Being two individuals who have their own backgrounds, experiences, preferences, likes and dislikes, and even ideologies, it is only natural that they do not see eye-to-eye on certain issues. But when they have regular contact and frank discussions between them, the chances are that they resolve their differences and come to understand each other's points of view in the interest of the nation's well-being which is their common object. Though the President is the constitutional head of the government, he is not a rubber stamp. He has certain responsibilities on his shoulders and article 78 helps him to discharge those responsibilities properly. He cannot remain a silent spectator but has to protect the Constitution as per his oath.

Krishna Iyer J has discussed the impact of article 78 in these words:⁵¹

50 Vidya Subrahmaniam, "K.R. Narayanan - President who defied stereotype" *The Hindu*, Nov. 10, 2005, available at: <http://www.thehindu.com/2005/11/10/stories/2005111003281400.htm> (last visited June 15, 2015).

51 V.R. Krishna Iyer, "President and Information" in Lokendra Malik and Manish Arora (eds.), *The Judge Orates: Selected Writings of Justice V. R. Krishna Iyer* 126 (Universal Law Publishing Company Pvt. Ltd., New Delhi, 2014).

Confidentiality as against the Presidency is constitutional boloney. The reservoir of information with the Union is no monopoly of a Minister or military general, court or commission. It is the Republic's pool open to the President, the conduit being the Prime Minister. No known doctrine or executive privilege supports the contrary proposition. The ordinary citizen has restrictions based on the reasonable needs of security of State and other constitutionally sanctioned criteria inapplicable to the President any more than to the Prime Minister. It is one thing to say that the President cannot exercise executive power. It is another to argue that he shall not know his Minister's operations.

He further went on to say:⁵²

Some wisecracks in unwitting naiveté ask what will happen if the Prime Minister refuses information to the President. If the situation under the Constitution clearly mandates the Prime Minister to furnish the facts asked for, the sanction behind is the Constitution itself. No one can breach a well understood or interpreted article of the *suprema lex* because if you ever so high the Constitution is above you. Otherwise, the same strain, wags may ask what if the Court's writ is violated by the Executive.

Article 78 provides a very important power to the President to influence the decision-making process of the union government. Though now it is well-settled that the President is a constitutional head of the union government who is generally bound to act on the aid and advice of the council of ministers headed by the Prime Minister in the exercise of his constitutional powers and functions, it is also equally clear that the President is not a rubber stamp or a cipher. Like the British monarch, he is fully empowered to exercise his rights to be consulted, to encourage and to warn the government through article 78 of the Constitution. By exercising this right the President can guide the government to run the administration properly. The Prime Minister is duty bound to honour the mandate of article 78.

In the constitutional history of our country, over the years it has been observed that there has been a regular correspondence between the President and the Prime Minister and the latter makes courtesy calls to the former either fortnightly or monthly. These courtesy calls are made in compliance with article 78 of the Constitution. Starting from Rajendra Prasad to Neelam Sanjiva Reddy and Nehru to Indira Gandhi, article 78 was implemented in its full spirit and there was always a regular exchange of views between the President and Prime Minister on different issues relating to the union

52 *Id.* at 126.

government. But unfortunately the things went out of order during Rajiv Gandhi's government when President Zail Singh claimed that the Prime Minister was not following his duties under article 78 of the Constitution. Even rumours spread in the media that Zail Singh had planned to dismiss Rajiv Gandhi's government and for the first time in the constitutional history of our country, a President was compelled by circumstances to issue a statement that he had no such intention to dismiss the Prime Minister.⁵³ That was really a very unfortunate episode in the history of our parliamentary democracy and even the foreign media did not leave any opportunity to take the cognizance of that episode.⁵⁴ Our Constitution does not allow any segregation of information between the President and the Prime Minister. The President is an integral part of the government and the Parliament and he has a complete right to be informed about the decisions of the union government and the Prime Minister cannot take the plea of confidentiality against the President. The President has full right to know the inside working of the government and its decisions. After all, he is the head of the state.

This paper is of the view that the government cannot conceal any information relating to the union administration from the President. As stated earlier, if the government thinks that the President is misusing the supplied information, then the right course is to bring impeachment proceedings against him because that would be a case of violation of the Constitution for which he can be impeached by the Parliament under article 61 of the Constitution. But if things move on normally the Prime Minister cannot take the plea of confidentiality against the President who is the constitutional head of the union government.

It may be noted that like the British monarch, the President of India is also an integral part of Parliament as well as government. He is fully entitled to know what decisions are taken by the council of ministers and ministers. As mentioned earlier, under article 60 of the Constitution, he takes oath to preserve, protect and defend the Constitution and the law and if he thinks that the government has taken some decision which goes against the Constitution, it is his constitutional duty to check the position with the Prime Minister and ask him to supply the necessary information. Although finally the President cannot stop the decision of the government,⁵⁵ he can certainly

53 P. Tharyan, "Does the Office Make the Man" 23 *Civil and Military Law Journal* 104 (1987).

54 *Supra* note 45.

55 *Supra* note 11.

influence the Prime Minister and make a difference in the decision-making process of the government. The President cannot be a party to any decisions or acts which are likely to be found unconstitutional. The President is expected to apply his mind before putting down his signatures on any ministerial decision or proposal.⁵⁶

Seervai has also emphasized on the importance of President's rights under article 78 of the Constitution. He observes:⁵⁷

The requirement that the Prime Minister should communicate proposals for legislation and furnish such information as the President may require relating to the proposals for legislation is obviously designed to enable the President to advise and/or warn the Council of Ministers about provisions which appear to him to violate the Constitution, or provisions which may create damaging controversy in the country. No doubt the Council of Ministers is free to disregard his advice. But if the President commands respect from the Council by reason of his personality, character and soundness of his judgment, the Council would not lightly disregard his advice, even if the Council does not give up its proposals, it may modify them.

B.N. Rau too has highlighted the importance of president's influence in the decision-making process of the government in these words:⁵⁸

Does this reduce the President, under the Indian Constitution, to a figurehead? Far from it. Like the King in England, he will still have the right to be consulted, to encourage and to warn. Acting on ministerial advice does not necessarily mean immediate acceptance of the Ministry's first thoughts. The President can state all his objections to any proposed course of action and ask his Ministers in Council, if necessary, to reconsider the matter. It is only in the last resort that he must accept their final advice. It has been observed that the influence of the Crown-and of the House of Lords as well-in England has grown with every curtailment of its legal powers by convention or statute. A similar result is likely to follow in India too; for, as has been well said, "the voice of reason is more readily heard when it can persuade but no longer coerce". One can conceive of no better future for the

56 Subhash C. Kashyap, *Constitutional Law of India* 1043 (Universal Law Publishing Company, New Delhi, 2008).

57 *Supra* note 20 at 2053-2054.

58 *Supra* note 11.

President of India than that he should be more and more like the Monarch in England, “eschewing legal power, standing outside the clash of parties and gaining in moral authority.”

The President represents the collective will of the nation and he is not a puppet of any person or party. He is at the apex of the government and people look to him with respect and loyalty. He is a safety-valve of our democracy. He is the guardian of the Constitution⁵⁹ and article 78 empowers him to fulfill his constitutional obligations effectively. As rightly mentioned by Krishna Iyer J, the Prime Minister cannot disobey the President in respect of article 78.

VII Concluding observations

In view of the foregoing discussion it is submitted that the right of the President under article 78 of the Constitution against the Prime Minister is very important to influence the decision-making process of the government for right causes. Though the President is a constitutional head of the union government, he is not a rubber stamp. He bears certain important responsibilities on his shoulders under the Constitution and is duty bound to defend the Constitution and the laws as per the mandate of his oath duly taken under article 60 of the Constitution. If he fails to protect the Constitution, he can be impeached by the Parliament.⁶⁰ Article 74(1) of the Constitution requires the President to act only with the aid and advice of the council of ministers in the discharge of all his functions.

The Supreme Court through various decisions has also upheld the position that the President is a constitutional head who must act on the advice of the council of ministers and that the real executive power in our system vests in the council of ministers headed by the Prime Minister. But, it also held that the President is not a rubber stamp and there are some areas where the President may have to use his own judgment and wisdom.⁶¹ These are: (1) appointment of the Prime Minister in a situation where no single party or alliance commands clear majority support in the Lok Sabha (obviously, the President cannot appoint the new Prime Minister on the advice of the outgoing Prime Minister who may have lost the election or the support of the house); (2) appointment of a Prime Minister in case of sudden death where

59 The Constitution of India, art. 60.

60 *Id.*, art. 61.

61 *Ibid.*

the ruling legislature party is unable to meet immediately to elect a leader, there is no settled seniority among cabinet ministers and a name from outside the cabinet is suggested; (3) dissolution of the Lok Sabha on the advice of a council of ministers that may have lost majority support or against whom a vote of no-confidence may have been passed; (4) dismissal of ministers in case the council of ministers loses the confidence of the House but refuses to resign; and (5) granting sanction of prosecution against the Prime Minister.

The 44th constitutional amendment has given the important power of referral to the President. Though finally he is bound to act on the reconsidered advice of the council of ministers, he can delay the decision. Article 78 is another weapon in his hands to control an unruly Prime Minister. He can exercise this power on his own discretion. It is indeed a good opportunity in the hands of the President to guide the government to ensure the smooth functioning of the parliamentary system in the country.

The President has full power to ask the Prime Minister to supply him any information pertaining to the union government under article 78 and in this regard he is not bound to consult the council of ministers under article 74(1). It is his independent power. In fact, it is his duty as well to keep himself informed about the working of the union government. What information he needs, he has to decide. He will not take the view of the cabinet.

The plea of confidentiality is totally unacceptable against the President. The Prime Minister has to trust the President and if he is not able to trust him, he should bring impeachment motion against him and remove him from the office. But the Prime Minister cannot take the President for granted. Though no remedy is prescribed in the Constitution if the Prime Minister breaches his duty under article 78, the public opinion will certainly compel the government to follow the right course.

Though notionally the President represents the collective will of the nation and the people hold him in high esteem and do not want to see him hapless when difficult constitutional issues arise. The President cannot remain a silent spectator when the government violates the Constitution. He would have to check the position with the Prime Minister. Though generally he is bound to act on the advice of the council of ministers, he cannot accept some illegal or unconstitutional advice of the council of ministers. He would have to warn the government. Article 78 is a tool in his hands to bring transparency and accountability in the working of the government which he should use for the right causes. The information which he receives must be used for constitutional purposes and not otherwise. The President should not become a parallel centre of power. But he should act in accordance with the Constitution.

It is submitted that the President can exercise a persuasive influence on the elected government headed by the Prime Minister and help it with his advice and experience. Like the British sovereign, the role of the President is to advise, encourage and warn the ministers in respect of the advice which they give to him. However, his influence depends on his personality. A man of character and ability can really exert a potent influence on the affairs of the council of ministers and guide it to conduct the administration as per the constitutional mandate. He can really check the excesses of the government and the Parliament and encourage them not to commit the constitutional violation. Article 78 of the Constitution is a very important constitutional device in the hands of the President which he can use for making the government more transparent, accountable and socially sensitive. Though he does not participate in the cabinet meetings, he can influence the decision-making process indirectly for promoting good governance and rule of law in the country.