

President is constitutional head of state

The Straits Times, 8 August 2011

Law Minister K. Shanmugam spoke at the Institute of Policy Studies forum on the elected presidency on Friday. We run today edited excerpts from his speech and the dialogue that followed.

I will set out the president's pre-1991 constitutional role and powers; consider the effect of the 1991 constitutional amendments giving the president additional powers; and discuss some points made recently in the media and elsewhere about the elected president's powers - and the extent to which such points are grounded in legal reality.

The elected president can be highly influential and has significant powers. But much of the discussion so far has not focused on the elected president's real powers and influence. Instead the focus has been on issues that have no legal basis - such as whether the elected president can speak in public to contradict the Government, to disagree with the Government, and so on.

In law, the elected president has no such powers. That was not the role envisaged for the presidency.

The Constitution provides for the important institutions of state, including the presidency, Parliament, the executive and the judiciary. Our presidency is created by the Constitution. That means the Constitution alone can be the source of his powers.

The president is the head of state. In our system, the head of state and the head of government are different. As British constitutional expert Vernon Bogdanor puts it, in such a system, the functions of a head of state 'are generally of three main kinds: First, there are constitutional functions, primarily formal or residual, such as appointing a prime minister and dissolving the legislature. Second, there are various ceremonial duties. Third, and perhaps most important, is the symbolic function, by means of which the head of state represents and symbolises not just the state but the nation'.

I will look at the constitutional functions, since most of the ongoing public discussion relates to this aspect. Three points need to be made:

In the discharge of his constitutional functions, the president can act and speak only as advised by the Cabinet (unless otherwise provided in law).

This means all his public acts - including public speech - can be undertaken only on the advice of the Cabinet, except where powers specifically vested in the presidency allow otherwise.

The president cannot act of his own volition; he cannot reject the Cabinet's advice; he must be impartial and be seen to be impartial on political debates. These principles are articulated in Articles 21(1) and 24(2) of the Constitution.

Article 21(1) states: 'Except as provided by this Constitution, the President shall, in the exercise of his functions under this Constitution or any other written law, act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet.' (Note it says 'shall', not 'may'.)

Article 24(2) states: 'Subject to the provisions of this Constitution, the Cabinet shall have the general direction and control of the Government and shall be collectively responsible to Parliament.'

These constitutional points can be underlined with reference to a famous event in British monarchic history: the romance between King Edward VIII and Mrs Wallis Simpson. In 1936, King Edward, wishing to marry Mrs Simpson, wanted to make a speech to the public to make his case. Then-Prime Minister Stanley Baldwin told the King, in no uncertain terms, why he was not allowed to make such a speech. The King could not even speak about the lady he wanted to marry, except as authorised by the Cabinet.

It is obvious that the same principles will apply with greater force if the King (or a head of state) wanted to speak on transport fares, the nationalisation of transport operators, or the cost of living.

The president symbolises and represents the entire country. As such, he has to be above the political fray. He cannot publicly engage in a debate with the Government. If he comments on social or political issues, the office will be dragged into politics.

This rule ultimately protects the presidency. If the president acts and speaks only on the advice of the Cabinet, his office would not be burdened by the responsibility for the outcome of specific policies. This allows the president to be representative of the entire country.

The constitutional limits do not mean that the president has no influence. On the contrary, he can wield influence through his regular discussions with the prime minister.

The president receives Cabinet papers and meets the prime minister regularly to discuss a wide range of issues. His influence can be considerable.

Any prime minister will give due weight to such advice as he may receive from the president, especially if the president has substantial experience, is wise and knowledgeable, and is trusted and respected by the prime minister. Of course, whether the president actually wields influence depends very much on who the president is. If he is someone who is not experienced, wise and knowledgeable, then his influence would be limited.

Walter Bagehot famously wrote of the British monarch: 'The sovereign has... three rights - the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others. He would find that his having no others would enable him to use these with singular effect.'

Bogdanor, noting that the current British monarch, Elizabeth, has been on the throne since 1952, said that she would be in a position to warn ministers of the possible bad consequences of the policies they propose, precisely because she has had such deep experience of government, spread across 12 British prime ministers, beginning with Winston Churchill.

Our president would exercise similar influence if he is a person of wide and deep experience.

The president has to keep his discussions with the prime minister confidential.

Bogdanor notes: 'It is important to notice that the sovereign's right to express her opinions on government policy... entails... that communications between her and the prime minister remain confidential. She is not entitled to make it known that she holds different views on

some matter of public policy from those of her government... It follows, therefore, that the sovereign must observe a strict neutrality in public and great discretion in her private conversation.'

Practically, if the president does not keep the discussions confidential, then the prime minister will most likely cease engaging in any meaningful discussion with him.