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EDITORIAL NOTE

LEXKHOJ is delighted to announce its first edition of the *Lexkhoz Research Journal of Law and Socio-Economic Issues* which is a peer reviewed international journal, publishing critical approaches to socio-legal study and multi-disciplinary analysis of issues related to law and socio-economic. The journal will strive to combine academic excellence with professional relevance and a practical focus by publishing wide varieties of research papers, insightful reviews, essays and articles by students, established scholars and professionals as well as by both domestic and international authors. Authors should confirm that the manuscript has not been, and will not be, submitted elsewhere at the same time.

The Journal provides a forum for in-depth analysis of problems of legal, social, economic, cultural and environmental transformation taking place in the country and world-wide. It welcomes articles with rigorous reasoning, supported by proper documentation. The Journal would particularly encourage inter-disciplinary articles that are accessible to a wider group of Social activist, economist, Researcher, policy makers, Professionals and students.

This quarterly issue of the journal would like to encourage and welcome more and more writers to get their work published. The papers will be selected by our editorial board that would rely upon the vibrant skills and knowledge immersed in the paper.

Needless to say, any papers that you wish to submit, either individually or collaboratively, are much appreciated and will make a substantial contribution to the early development and success of the journal. Best wishes and thank you in advance for your contribution to the Lexkhoz Research Journal of Law and Socio-Economic Issues.

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RELATION BETWEEN THE PRESIDENT AND THE COUNCIL OF MINISTERS

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ABSTRACT

In the Scheme of the Parliamentary system of Government provided by the Constitution of India, the President is the nominal executive (de-jure) authority and the Prime Minister is the real executive authority (de-facto). The constitution formally vests many functions in the president but he has no function to discharge in his discretion, or on his individual judgement. He acts on ministerial advice and therefore the Prime Minister and the Council of Ministers constitute the real and effective executive. According to the Constitution of India, the executive power of the Union is vested in the President and shall be exercised by him either directly or through officers subordinates to him. When the president acts directly, he acts on the advice of the Council of the ministers.

As per the original constitution, Article 74(1) stated that, "there shall be a Council of Ministers with the Prime Minister at the head to aid and advice the President in the exercise of his functions". However, there was a slight ambiguity whether the advice of the Council of Ministers is binding on the President. In the year 1976, the forty second constitution amendment made it explicit that the President shall, "act in accordance with such advice".

In this article I would discuss the actual position of the President and council of Ministers under the constitution of India, Role of the President in appointment and removal of the Ministers, Relations between the President and the Council of Ministers. I would also like to discuss some case laws relating to relation between the President and the Council of Ministers.

INTRODUCTION:-

According to the Constitution of India, the executive power of the Union is vested in the President and shall be exercised by him either directly or through officers subordinates to him¹. When the president acts directly, he acts on the advice of the Council of the ministers. The executive power of the Union is co-extensive with the legislative power of parliament², and the parliament consists of the President and the two houses to be known respectively as the council of the states and the house of the people³. Thus, on the one hand, President is the head of the Executive, and on the other, he is a constituent part of Parliament.

Union Council of Ministers of India comprises three different kinds of Ministers Cabinet Ministers, Ministers of State and Deputy Ministers. The Council of Ministers helps and aids the President in the execution of his functions⁴. Prime minister is the head of the council of ministers. It is seen that the Council of Ministers is the real vestige of power in the Indian government. The Indian Constitution does not mention anything about the Cabinet Ministers except in Article 352 where Cabinet is defined as the Council consisting of Ministers of Cabinet rank. However, in India it is the Cabinet which takes all the policy decisions and advises the President. Advice tendered to the president by the Council of Ministers cannot be inquired by anybody⁵.

The President is the Head of the State and the chief executive of the Indian Union but for all practical purposes the real executive authority is vested in the Prime Minister and his/her Council of Ministers⁶. Hence there is a relationship which exists between the president and the council of the ministers.

¹ Art 53(1), Constitution of India.

² Art 73(1)

³ Art 79

⁴ Art 74(1)

⁵ Art 74(2)

⁶ Negi Mohita, The Indian Council of Ministers: Organisation, Appointment, Provisions and other Details, Available at <http://www.yourarticlelibrary.com/essay/the-indian-council-of-ministers-organisation-appointment-provisions-and-other-details/24883/>

POSITION OF THE PRESIDENT UNDER THE CONSTITUTION:-

In the Scheme of the Parliamentary system of Government provided by the Constitution, the President is the nominal executive (de-jure) authority and the Prime Minister is the real executive authority (de-facto). Article 52 states that there shall be a President of India. The President of India is the formal head of the executive, legislature and judiciary of India and is the commander-in-chief of the Indian Armed Forces. According to the constitution of India, the President shall be elected by the members of an electoral college, which consists of the elected members of both the Houses of Parliament, and the Legislative Assemblies of the States and the two Union Territories, namely Delhi and Puducherry⁷. The election of the President is held in accordance with a system of proportional representation by means of a single transferable vote⁸. Thus in the election of the President the citizens play no direct part and he is elected indirectly by the representatives or the people like the American President but no special electoral college is elected, as in the case of America. The process of election of the President of India is original and no other Constitution contains a similar procedure.

POSITION OF THE COUNCIL OF MINISTERS UNDER THE CONSTITUTION:-

The Council of Ministers exercises executive authority in the Republic of India. It consists of senior ministers, called "Cabinet Ministers", and junior ministers, called "Ministers of State". Prime Minister is the head of the council of minister. The Council of Ministers are responsible to the lower house of the Indian Parliament, called the House of the People. According to the Constitution of India, the total number of ministers in the Council of Ministers must not exceed 15% of the total number of members of the House of the People. Ministers must be members of parliament.

⁷ Art 54

⁸ Art 55(3)

RELATION BETWEEN THE PRESIDENT AND THE COUNCIL OF MINISTERS:-

Art 74, 75 and 78 of the constitution of India broadly govern the relationship between the council of ministers and the president. The chief function of the council of minister is that of rendering aid and tendering advice to the president.

Until the Forty second Amendment to the Constitution settled the issue, there was a great deal of academic debate over the role contemplated, in the Constitution of India for the President of the Republic⁹. On 4th Nov, 1948, when Dr. Ambedkar presented the Draft Constitution, which was drafted by the Drafting Committee that he headed; the vision of the new Constitution of India he defined was clearly a Parliamentary system with the twist of a ceremonial President at the top¹⁰. The parliamentarian system and the presidential system are fundamentally different. According to him “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.”

The Constitution adopted on January 26th, 1950 had the following to say about the relationship between the President, Prime Minister & Council of Ministers:

- (i) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions¹¹.
- (ii) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court¹².

From the wording of Art 74, as it originally stood, that there shall be a council of ministers to “aid and advise” the president in the exercise of his functions, one could, perhaps, get the impression that the functions of the ministers are merely advisory, and it is left to the president to accept the advice or ignore the same and thus the decision on all matters will be of the president himself. But on true interpretation of the expression, in the context of the relevant provisions of

⁹ President’s Relation to His Council of Ministers, Negi Mohita

¹⁰ Taken from the Article titled as Indian constitution: President vs Prime minister, Available at <http://karmadude.com/indian-constitution-president-primeminister/>

¹¹ Art 74(1), Before 42nd Amendment

¹² Art 74(2)

the constitution, it becomes abundantly clear that the function of the council of the ministers is not merely giving advice, they can take decisions which are expected to be binding¹³. In draft constitution, nowhere was written that the President is bound by the advice, which is contrary to what Dr. Ambedkar had mentioned in his speech. This seems like a very obvious contradiction, which from the Constitution point of view, makes the President more powerful than the Council of Ministers.

To make matters clear beyond doubt, Article 74 (1) was amended by the Forty Second Amendment in the year 1976. Now it clearly states that the President is bound to act in accordance with the advice of his Council of Ministers. Earlier there was no express provision to this effect in the Constitution. The forty fourth Amendment further added a proviso to Article 74(1) to effect that the president may require the council of ministers to reconsider such advice, and the president shall act in accordance with the advice tendered after such reconsideration. Thus it could be seen that the Fort Second Amendment simply reproduce the position which has been there all along as an essential requisite of the parliamentary form of the government.

ROLE OF THE PRESIDENT IN APPOINTMENT OF COUNCIL OF MINISTERS:-

The first step in the process of forming a council of ministers is to find a Prime Minister because the council of ministers is headed by the Prime Minister¹⁴. According to the Constitution, The Prime Minister is appointed by the President of India. In actual practice, however, the choice of the President in the appointment of Prime Minister is limited. He appoints only that person as Prime Minister who is the leader of the party or coalition of parties having an absolute majority in House of the People. In case no party has an absolute majority in House of the People, the President can appoint any person as Prime Minister who, in his opinion, is able to form a stable Government.

Other ministers or the council of ministers are to be appointed by the President on the advice of the Prime Minister¹⁵. The nomination of ministers rests with the prime minister. This does not

¹³ Constitution of India, V.N Shukla, Eastern Book company, 11th Ed. 2012

¹⁴ Art 74(1)

¹⁵ Art 75(1)

mean that the President may not have considerable influence, but as against the President the Prime Minister has the final word.

ROLE OF THE PRESIDENT IN REMOVAL OF COUNCIL OF MINISTERS:-

Ministers hold office during the pleasure of the president¹⁶. The term 'Ministers' in the clause (2) of Art 75, includes the Prime Minister. The fact is that each minister holds his office at the president's pleasure indicates that his office is at all time at the Prime Minister's disposal, for in these matters the president acts on the advice of the Prime Minister¹⁷. The established convention of parliamentary government is that a ministry that has lost the confidence of the lower house must resign, unless it asks for and is granted dissolution. Where such a situation has taken place, a ministry will resign itself and there will hardly be need for the president to exercise the right of dismissal. If the dissolution is not granted and yet the ministry insists on remaining in office, the president, it appears, may properly dismiss the ministry. Fortunately no such eventuality has arisen since the commencement of the constitution.

OTHER RELATIONS:-

Though the president takes no part in the formal deliberations of ministers, he is constitutionally entitled to criticise the conduct of the executive, and 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 communicate to him¹⁸. The channel of communication with the president in all these matters is the Prime Minister. It is the duty of the Prime Minister to furnish such information relating to administration or legislation only on the request of the president¹⁹. Ministers are collectively responsible to the house of the people for all the decisions of the cabinet. To maintain this collective responsibility doctrine, clause (c) of the Article 78 empowers the president to require a matter on which a decision has been taken by minister, but has not been considered by the council of ministers, to be submitted to the council of ministers for its consideration. It shall be the duty of the Prime Minister, if the President so requires, to submit for

¹⁶ Art 75(2)

¹⁷ Constitution of India, V.N Shukla, Eastern Book Company, 11th Ed 2012.

¹⁸ Art 78(a)

¹⁹ Art 78(b)

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 certainly not intended to authorise the president to reopen any decision already taken by the council of ministers.

IS THE PRESIDENT ALWAYS BOUND BY THE ADVICE OF THE COUNCIL OF MINISTERS?

In the year 1951, the first president of India had raised the question whether the president was always bound by the advice of the Prime Minister and his cabinet. However the controversy took the form of violent political storm in the year 1984-89 and the relationship between the president and Prime Minister deteriorated steadily.

Art 78 of the Constitution gives him role, independent of his council of Ministers, for calling for information relating to the administration of the affairs of the Union. In the course of the formulation of a policy, the President, it has been suggested, may give his counsel or require the matter to be reconsidered by the Council of Ministers as a whole but once a policy has been decided by the Council of Ministers and formally submitted to him, he has ultimately to abide by it and act accordingly.

There are few exceptions where the President may use his powers independent of the aid and advice of the Council of Ministers. The following are the circumstances where the President acts on his discretion

- (i) In appointing the Prime Minister from among the contenders when no single party attains majority after elections to the Lok Sabha.
- (ii) The Council of Ministers after being voted out and after resigning advises the President to dissolve the Lok Sabha and hold fresh elections, the President may exercise in his direction.
- (iii) In the exercise pocket veto;
- (iv) Can return the advice of the Council of Ministers once for its reconsideration.
- (v) Can return the Bill passed by the Parliament once for its reconsideration.

These discretionary powers of the President helps to maintain democracy in its true spirit, otherwise it may degenerate into populist dictatorship.

CASE LAWS:-

In the case of *S. R. Bommai v. Union of India*²⁰, clause (2) of Article 74 was questioned and it was contended that since the Proclamation under Article 356(1) would be issued by the President on the advice of the Council of Ministers given under Article 74(1) of the Constitution and since Clause (2) of the said Article bars inquiry into the question whether any, and if so, what advice was tendered by Ministers to the President, judicial review of the reasons which led to the issuance of the Proclamation also stands barred.

In this regard Supreme Court held that although Article 74(2) bars judicial review so far as the advice given by the Ministers is concerned, it does not bar scrutiny of the material on the basis of which the advice is given. The material on the basis of which advice was tendered does not become part of the advice. The Courts are justified in probing as to whether there was any material on the basis of which the advice was given, and whether it was relevant for such advice and the President could have acted on it. Hence when the Courts undertake an inquiry into the existence of such material, the prohibition contained in Article 74(2) does not negate their right to know about the factual existence of any such material.

CONCLUSION:-

The council of ministers are the real power house in the Indian political system. Though the president is the head of the state but the head of the government is Prime Minister. All the executive functions of the president are performed by the Prime Minister and his Council of ministers. The legislative functions of the President are guided by the advice of the Prime Minister. But at the same time the President has a hold on the government. A presidential consent is mandatory for a bill to become an Act. He can give his assent or can send it back for reconsideration.

²⁰ AIR 1994 SCC (3)

Council of ministers are collectively responsible to the Lok sabha and not to the president, this makes the Prime Ministers and the Council of Ministers accountable to the Lok sabha and not to the President. The relation between the Council of Minister and the President largely depends on the charisma and the lack of ambition on the part of the President and the personality of the Prime Minister, for he commands his Council of Ministers.