RELATIONSHIP BETWEEN PRESIDENT AND COUNCIL OF MINISTERS

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ABSTRACT

The relationship between the two most powerful posts in the India, President and Council of Ministers, is not clearly layered out in the Constitution of India. This led to various controversies regarding exercising the powers vested with these posts. But it should be noted that every time such a controversy arose, it has been confirmed that the President is just a constitutional head and the real power rests with the Council of Ministers. The controversy between the powers were largely solved by the 42nd Constitutional Amendment Act. Moreover, with this research paper we can conclude Article 74(1) and 75(3) must be read together to determine how the President can exercise his powers which ultimately states that the advice of the council of ministers needs to be followed by the President as long as parliamentary support is available, and in the event the parliament is being dissolved, the president need not wait for advice from the PM he may use his own discretion at will.

But this issue of powers still remains unanswered in clear terms in the Constitution. This research paper looks into the development of relationship between the President and the Council of Ministers after Independence. It also looks into the controversies which arose regarding the power of the President to take decisions. This research paper also goes on to analyse the present situation of the relationship between President and Council of Ministers after various constitutional developments.

INTRODUCTION

Until 1976, when the forty-second amendment to the Constitution settled the very controversial and hotly debated issue of the role of the President according to the Constitution of India. At that moment, Dr. Rajendra Prasad gave his contribution to the controversy by saying that “there is no

provision in the Constitution in which so many words lays down that the President shall be bound to act in accordance with the advice of his Council of Ministers”\(^2\).

There were different views regarding the role of the President according to the Constitution of India. Thinkers of one view believed that the post of the President cannot be that of a ‘real’ executive if the President follows the provisions of the Constitution of India. But there was another view which said that the President has some ‘real’ powers in the constitution which can be used in exceptional circumstances. Another school of thought believed that the President is the Constitutional head of the State who is supposed to act on the advice of the Ministers but can execute some real powers at his discretion.

This confusion arose because the intention of the founding fathers of the Constitution is not clear. Dr. Ambedkar, one of the founding fathers, tried to explain the role of the President by saying that the President “occupies the same position as the king in the British Constitution. He can do nothing contrary to the Minister’s advice. He is the head of the State, but not of the Executive”. But on the other hand some people like Jawaharlal Nehru believed that the President’s post is not of that of a rubber stamp like the President of France. Though the Constitution does not explicitly provides the President with ‘real’ powers but this position is of that of dignity and authority.

In this research paper, the researcher looks into the development of relationship between the President and the Council of Ministers after Independence. It also looks into the controversies which arose regarding the power of the President to take decisions. The researcher then goes on to analyse the present situation of the relationship between President and Council of Ministers.

**PROVISIONS IN THE CONSTITUTION**

Central executive is dealt with from Article 52\(^3\) to 78 in the Constitution of India. India follows a Parliamentary type of government as the Council of Ministers is responsible to the Lok Sabha.


\(^3\)
The President and the Council of Ministers, with Prime Minister as its head, form the Central executive.\(^4\)

The position of President is that of the head of the state. He is the formal executive as all the decisions taken by the government are taken under his name. According to Art. 53(1), "The executive power of the Union shall be vested in the President and shall be exercised by him directly or through officers subordinate to him in accordance with this Constitution".

According to Art. 74(1), “there shall be a Council of Ministers with the Prime Minister at its head to aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice.”\(^5\)

The provision clearly denotes that the Council of Ministers should be there all the time. The President does not have the power to dispense the Council of Ministers. Even when the Lok Sabha is dissolved, the Council of Ministers should keep working. In *U.N.R. Rao*\(^6\), the Supreme Court clearly ruled out the possibility of the President ruling with the help of his advisers in case of absence of the Council of Ministers. The SC rejected the argument that the “shall” in Article 74(1) can be read as “may”.\(^7\) SC said that as the position of President is compulsory according to Article 52, the position of Council of Ministers is also necessary and rejected the argument that when there is no Lok Sabha, Council of Ministers are not responsible to anyone and the position can be done away with.\(^8\)

The rationale behind this order is very clear. Had the SC accepted the above argument then the whole concept would have changed. It would meant that the position of President has the power to rule the country without the Council of Ministers till he is impeached for the same. Therefore, the court prudently interpreted the word “shall” strictly to make sure that the President does not function without the Council of Ministers at any point of time. This shows how the Supreme

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\(^3\) *India Const.*, art. 52.
\(^4\) *Id.*, art. 78.
\(^5\) *Id.*, art. 74, cl. 1.
\(^7\) *India Const.*, supra note 3, art. 74, cl. 1.
\(^8\) *Id.*, art. 52.
Court had a supreme role to play in promoting and strengthening the parliamentary system of government that the founding fathers of the Constitution envisaged in India.

On the face of it, the provision might seem as mandatory because of the word “shall” used in it but it cannot be channelled in any court and is of merely directory nature. Article 361 protects the President from any action by the court for any ban that he places on the legal actions. According to Article 74(2), the Courts are barred from enquiring or investigating about the advice given by the Council of Ministers to the President. Therefore, the courts are helpless in this particular case and no remedy can be pursued from the court in case the President does not take cognisance of the advice given by the Council of Ministers.

The only fear that the President has in case he ignores the advise given by the Council of Ministers is that the Lok Sabha can start impeachment proceedings against him for “violation of constitution” under Article 56(b) of the Constitution. But the process of impeachment is very complex and requires a very strong government enjoying majority in one house with support of two-third of total membership in other house as it is requisite to pass a motion with no less than two-third majority of the total membership of the House.

To conclude, we can say despite the attempt to codify the convention, the provision in Article 74(1) of the Constitution is merely directory in nature and is not a legally enforceable injunction.

WHO IS THE ACTUAL HEAD OF THE STATE?

The executive power that is vested in the President by the Constitution should be exercised in accordance to the constitution. In a parliamentary form of government, it is necessary that the effective power rests with the Council of Ministers and not with the President. Therefore, though

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9 Id., art. 361.
11 India Const., supra note 3, art. 56, cl. b.
12 Id., art. 74, cl. 1.
prima facie the power seems to be vested in the President, the Council of Ministers takes all the decisions.\textsuperscript{13}

The Constitution gives the President to exercise the executive power vested in him either directly or through the officers subordinate to him.\textsuperscript{14} In this case, the Council of Ministers is regarded as the officers working under the President and therefore, the President exercises his powers through them.\textsuperscript{15} As the real power vests with the Council of Ministers, the personal satisfaction of the President is not prerequisite to every decision taken by the Council of Ministers.\textsuperscript{16}

The Supreme Court had, in a number of decisions, expressly accepted this constitutional position of the President. In \textit{Ram Jawaya v. State of Punjab},\textsuperscript{17} Mukherjea, C.J., speaking on behalf of the Supreme Court said “Our Constitution has adopted the British system of a parliamentary executive. The President is only a formal or constitutional head of the executive and the real executive power are vested in the Ministers or the Cabinet.”

In \textit{U.N.R. Rao v. Indira Gandhi},\textsuperscript{18} the Supreme Court emphasized that “the conventions operating in Britain governing the relationship between the Crown and the Ministers are very pertinent to the Indian Constitution as well, and the formal provisions of the Indian Constitution should be read in the light of those conventions.” The Court observed that the Constituent Assembly did not choose the Presidential system of Government.

In \textit{R.C. Cooper v. Union of India},\textsuperscript{19} the Supreme Court said "Under the Constitution, the President being the constitutional head, normally acts in all matters including the promulgation of an ordinance on the advice of his Council of Ministers." In \textit{Samsher Singh v. State of Punjab},\textsuperscript{18} the Supreme Court stated “it was not correct to say that the President is to be satisfied personally in exercising the executive power. The President is only a formal or constitutional

\textsuperscript{13} M. Ramaswamy, \textit{The Constitutional Position of the President of the Indian Republic} 640- 648 (1950).

\textsuperscript{14} U.N.R. Rao, \textit{supra} note 6.


\textsuperscript{18} U.N.R. Rao, \textit{supra} note 6.

\textsuperscript{19} R.C. Cooper v. Union of India, A.I.R. 1970 S.C. 564 (India).
head who exercises the power and functions conferred on him by or under the Constitution on
the aid and advice of his Council of Ministers. Whenever the Constitution requires the
'satisfaction' of the President for the exercise by him of any power or function, it is not his
'personal satisfaction', but, in the constitutional sense, the 'satisfaction of the Council of
Ministers'.”

When the President uses his powers to proclaim emergency in the country under Article 352 of
the Constitution, the Fundamental rights under Article 14, 21 and 22 can be suspended using
Article 359(1). But these orders are always signed by the Additional Secretary to the
Government of India. The SC held in K. Anada Nambiar v. Government of Madras, that the
personal satisfaction of the President of India is not necessary to issue such an order. If the
Additional Secretary to the Government of India issued a properly authenticated order under
Article 359(1), then that order cannot be challenged in any court on the grounds that the
President was not satisfied with the same. These provisions show that in cases of exercising
executive power, whether they are executive or legislative in nature, the President does not act
independently and merely acts on the aid and advice of the Council of Ministers.

From the provisions of the Constitution, it is very clear that the founding fathers of the
Constitution did not want the President to take all the decisions of central executive
independently. They envisaged that the President will only act on aid and advice of the Council
of Ministers. To ensure the same, the Constitutional framers wove various safeguards to make
sure that the President does not even ignore the advice given by the Council of Ministers. The
Constitutional framers wanted the effective power of the decisions of the Central executive in the
hands of the Council of Ministers instead of the President because the Council of Ministers is
responsible to the Lok Sabha and they believed that this would keep a check and ensure better
transparency in the functioning of the government.22

20 INDIA CONST., supra note 3, art. 359, cl. 1.
22 G. AUSTIN, supra note 10, at 132-133.
The Ministry may take the extreme step of resigning collectively in case the President overrides its decision. This will create a constitutional crisis and havoc across the country. Now, the President needs the Council of Ministers to administer the country and take decisions. Therefore, he will have to search for alternative Ministry which enjoys the majority support of Lok Sabha and justify the action of refusing the advice given by the Council of Ministers. President would thus be in a fiasco as the previous Ministry enjoyed the support of the majority of Members and the members would not be amicable to appointing a new Council of Minister just because of the conduct of the President.

Even the power of issuing an ordinance of the president is restricted. The President can only issue an ordinance for six months and the same has to be ratified by the Parliament when it comes in session.\(^{23}\) This shows how the President cannot carry on the administration of the country and take decisions independently without the cooperation of Council of Ministers.\(^{24}\) Moreover, the President can declare emergency only after approval of the two houses of Parliament.

From the above provisions of the Constitution, it is very clear that the office of a Ministry which enjoys the confidence of the Lok Sabha to ensure that the there is Parliamentary approval in all the decisions taken by the government. If the Council of Ministers does not have the confidence of the Lok Sabha then it would be difficult to carry on the operations of the government as their would be no cooperation and the Parliament may turn hostile.

The working of the Constitution since 1950 has clearly established that the president is just a titular head of the state and the real power vested with the Council of Ministers. Nehru, the first Prime Minister of India, had made it clear that the President is not responsible for the decisions taken by the government. The Council of Ministers are answerable to the Parliament for every aid or advice given to the President as the President does not exercise discretion in this regard.\(^{25}\)

\(^{23}\) M. Ramaswamy, supra note 13, at 645-647.
CONTROVERSIES

Due to the ambiguity of the constitution regarding the position of the President, there have been various controversies in the past. But it should be noted that every time such a controversy arose, it has been confirmed that the President is just a Constitutional head and the real power rests with the Council of Ministers.

It was not late after we attained democracy that the first controversy regarding the position of President arose. It was when the first President of India, Dr. Rajendra Prasad sent a note to the first Prime Minister of India, JawarharLal Nehru, expressing his desire to act without the interference of the Council of Ministers and take only those decisions which he deems fit. He asked for autonomy in the power to assent the Bill and sending messages to the Parliament. Prima facie, it appears that this argument arose in the mind of the then President by doing the literal interpretation of Article 86 and 111 ignoring the other provisions in the Constitution which are supposed to be read with this article. Nehru sought the advice of the then Attorney General, Setalvad and the member of Drafting committee, Ayyar, regarding this matter. Both of them were of the same opinion that it would be improper for the President to work independently without the advice of Council of Ministers as the provisions of the Constitution, specifically Article 74, does not permit the same. This matter did not become a huge controversy as Rajendra Prasad agreed to the views and did not force of his views on the then Council of Ministers.

But this did not mark the end of the controversies by Rajendra Prasad regarding the position of President. Another controversy arose in 1960 when Dr. Rajendra Prasad gave a speech while laying the foundation of the Indian Law Institute building. He said that he differed from the common belief that the President is like the Sovereign of Great Britain who is just a Constitutional head and had to act according to the aid and advice of the Council of Ministers.

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26 INDIA CONST., supra note 3, art. 86.
27 Id., art. 111.
He made mention of many Constitutional provisions which give powers and authority to the President which are to exercised without any aid or advice. He believed that this topic needs to be investigated and the differences between the President of India and Sovereign of Great Britain need to be carved out. For instance, he pointed out one difference that the President in India is elected and can be impeached by the Parliament at any time whereas the Sovereign of Great Britain is neither elected nor can be removed by the Parliament. From this he wanted to point out how he was answerable and responsible to the Parliament and could not exercise according to his own whims and wishes when given the power. He was also dissatisfied by how people were invoking the unwritten British Constitutional conventions and incorporating them into the written Constitution of India.  

This speech brought the relationship between President and the Council of Ministers into limelight. But Nehru clarified the same immediately in the Press Conference organised on December 15, 1960 that the remarks made by the President in the speech were only “casual” and confirmed that the position of President is very similar to that of the British Crown and it has always remained and acted as the Constitutional head of the country.

Unfortunately, the controversies did not stop here. Another controversy arose in 1967 when the during the Fourth General Elections Congress lost the monopoly it enjoyed in some states as the non-Congress government took power. When the question of electing the President came up, non-Congress put up their candidate against the Congress backed candidate. The non-Congress parties which broke Congress’s monopoly claimed that the position of President is not only that of a figure head and he has various constructive and important roles to play in that position, especially that of acting as the mediator between the Centre and the states.

This idea was very important in that scenario because the Centre was being ruled by the Congress party but many states were under the control of non-Congress government. This could have led to many Centre-state conflicts and tensions. This controversy did not come to limelight because

ultimately the Congress’s candidate was elected thus confirming that the President is also a Constitutional head.\textsuperscript{31}

These controversies actually helped to make the position clear in the end. Without any explicit provision for the same, it was clear that the President acted as a titular head only and the real power vested with the Council of Ministers. The words “aid and advice” in the article 74(1) does not actually denote the real power enjoyed by the Council of Ministers. Most of the decisions about the administration of the country are taken by the Council of Ministers without even taking the President into confidence.\textsuperscript{32}

After this the position of President was considered analogous to that of the British Crown. There was no decision that the President can take without the advice of the Council of Ministers except some in some cases of meagre importance. It is very clear that the Indian Constitution is actually based on the Parliamentary or the cabinet system of government in which all the decisions are taken by the Council of Ministers and the Council of Ministers is responsible to the Lok Sabha for the decisions taken by it. The President is not actually responsible for the decisions taken by the Council of Ministers. This shows how the position of President in India is very similar to that of the British Crown.

Despite the position regarding the position of President being this clear, the Parliament decided to amend Article 74(1) of the Constitution with 42\textsuperscript{nd} Constitutional Amendment Act, 1978 to avoid any confusion and to explicitly say that the President has to act in accordance with the aid and advice of the Council of Ministers.\textsuperscript{33} Apart from making the explicit what was implicit in all these years, this amendment did not bring about any real change in the working of the administration of the country. It only reiterated the position that was already cleared by the clarifications given for the controversies that arose. The basic objective of this amendment was to remove any doubt from the mind of the people and clear the position of law.\textsuperscript{34}

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\textsuperscript{32}Sen, President and Prime Minister, 27(7) ECON. POL. WEEKLY 331, 331-334 (1992).
\textsuperscript{33}Constitutional Amendment, supra note 1.
\textsuperscript{34}Sharma, Crisis Government In the Indian Constitution, 10(4) INDIAN J. POL. SCI. 11, 11- 14 (1979).
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This amendment brought an important proviso to the Article 74(1) which empowers the President to ask the Council of Ministers to reconsider the decision taken by it but forces the President to implement the same in case the Ministry again sends it to the President after reconsideration. And, further, that "the question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any Court".  

PRESENT POSITION

Therefore, the President in the present paradigm, has no option but to follow the council of ministers in the advice rendered to him on matter pertinent. Art. 74(1) keeps the president bound in all situations and this was what prevented a major standoff during the 2006 office of profit controversy.  

But the one safeguard that can assuredly be used by the president in order that his decision might hold water, is the use of the ‘reconsideration’ clause, this is a clause that will enable the decision of the council to be sent back from the president and shall be reconsidered. This was handy in avoiding president’s rule in UP when the Center insisted. Yet the situation was avoided because the president sent the decision of the council back, Again in 2002, when president’s rule was intended to be imposed in Bihar, here again the power of ‘reconsideration’ was used effectively to avoid a situation.

What has been changing recently Is that the court has declared that such advise given by the council of ministers can be struck down if it were ultra vires. Also, reference must be made to the responsibility and privilege of the president in keeping up with the happenings of the council of ministers. This is again the responsibility of the council of ministers U. Art. 78(b). This is a privilege and power in the purest forms of the words, also the president has the right to demand the happenings of the council and also put before the council any bill that is introduced by an individual minister, this is done to include a sense of collective responsibility among the ministers.

35 INDIA CONST., supra note 3, art. 74, cl. 1.
36 M.P. JAIN, supra note 24, at 545-550.
37 DURGA DAS BASU, supra note 25, at 283-285.
What is surprising from the phraseology of Art. 78 is that it is not governed by Art. 74, they are standalone from each other, this would mean that the president need not await advice from the council in calling for information and at the same time, the denial of advice to the president is a constitutional violation.\footnote{B. N. Rau, \textit{Indian Constitution In The Making} 67 (1960).}

It must be remembered that the president in the current instance is not a mere figurehead, and that the PM is tasked with communicating the proceedings of the parliament to the president, along with any other information that the president calls for, and to top it all the president can request the reconsideration of a member’s bill if he thinks it needs to be considered. In addition to all the above provisions, the president as in the British monarch, hold a persuasive value in the parliament.

This predicament of the president has befallen him as a direct consequence of the 42\textsuperscript{nd} Amendment act, where there are provisions in the act that bound the president to the advice given by the council of ministers. He has since been reduced to following the council’s lead on matters and has been unable to make a individual decision since, and the reconsideration can only be exercised limited, any breach, or deviation by the presidential candidate from this accept paradigm of operations, and he risks being impeached by the house. All this points to the impoverishment of presidential powers.\footnote{G. Austin, \textit{supra} note 10, at 59-61.}

**CONCLUSION**

It can be rightly deduced who holds all the cards in the deal, the council of ministers, and they exercise absolute power over the presidential powers that may/ may not be of any consequence in the long run. Ultimately, it is the intention of the constitution that the President should be an influence and not a power-centre, thus the persuasive powers.

Whereas the new provisions spoke everyone’s mind, there is a new kind of difficulty created. Because of the non explicit nature of the president’s powers, he could in some cases exercise
some discretion in matter that may need expert judgment, but in the aftermath of an explicit
delineation of presidential weakness, the room for discretion has all but been obliterated.

Yet the president has a responsibility that cannot be alienated, he still needs to select the Prime
Minister, and the Chief justice, and the like, here the exercise of proper judgment is required.
Similarly a situation where the house has been dissolved and there is no council of ministers is
also one which the president can exercise his (now) minimal discretion at. This will bring us to
the inevitable conclusion that Arts. 74(1) and 75(3) must be read together. Meaning that the
advice of the council of ministers need be followed by the president as long as parliamentary
support is available, and in the event the parliament is being dissolved, the president needn’t wait
for advice from the PM he may use his own discretion at will.

This said, one must come to terms with the fact that no matter how one amends the constitution
to remove discretion from presidency, there will ultimately be some area where the same
discretion would be inalienable and absolutely necessary. For this reason, even though there is
Art. 74(1), the presidential discretion with respect to the major appointments and decisions
hasn’t been affected.