

# **Constitutional Law I**

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## **President of India**

The office of the President is very august and the Constitution attaches to it many privileges and immunities. The President along with the Council of Ministers headed by the Prime Minister comprises the Central executive which has been dealt from Article 52 to 78 of the Constitution.

The President is the head of the state and the formal executive. All executive action at the centre is expressed to be taken in his name. This power has been granted to him under Article 53(1) which states that the executive power shall be vested in the President and shall be exercised by him directly or through officers subordinate to him.

The President of India is the head of state and first citizen of India and the Supreme Commander of the Indian armed forces. In theory, the President possesses considerable power. In practice, the President's role is comparable to those of a constitutional monarch, and indeed the office replaced that of the British monarch (represented by the Governor General) upon India's independence.

The Constitution only formally vests functions in the hands of the President. In reality he has no function to discharge his discretion and or his individual judgment. He has to act on ministerial advice and therefore the Prime Minister and the Council of Ministers constitute the real and effective executive.

It is said that this structure of the central executive closely resembles the British Model which functions on the basis of unwritten conventions. In India some of these conventions have been written in the Constitution with regards to tenure, appointment and collective responsibility of the Ministers. However, still some matters have been left to conventions for example the accountability of the Cabinet and the Minister for the acts of his subordinates.

The office of the president is created by Article 52 of the Constitution and the matters of election are dealt from Article 54 to 60 of the Constitution. The President is elected by the method of indirect election i.e. by an electoral college consisting of elected members of both Houses of Parliament and of the State legislative assemblies. The method of indirect election was to emphasize the ministerial character of the executive that the effective power resides in the

Ministry and not in the President as such. Secondly, the method of direct election would have been very costly and energy consuming. There was also the fear that a directly elected President may in course of time assume all the power.

The President derives its power from Article 53 which vests in him all the executive authority including the Supreme Command of the Armed forces. There are several other provisions in the Constitution which mention specific functions of the President. Briefly the President has the power to appoint all important offices including those of the Prime Minister and other Central Ministers, Governors, Judges of the Supreme Court and the High Courts and even Election commissioners. He even he has the authority to appoint commissions with respect to the administration of scheduled areas. Most importantly the President is vested with wide powers during Emergency under Article 352 to 360 of the Constitution including suspension of Fundamental rights. Moreover every bill comes to him for his assent and can either refuse to give his assent or send it back for reconsideration.

## ELECTION OF THE PRESIDENT

The office of the president is created by Article 52 of the constitution. The president is elected not directly by the people but my method of indirect election.

### . Eligibility

Article 58 of the Constitution sets the principle qualifications one must meet to be eligible to the office of the President. A President must be:

- A citizen of India
- Of 35 years of age or above
- Qualified to become a member of the Lok Sabha

A person shall not be eligible for election as President if he holds any office of profit under the Government of India or the Government of any State or under any local or other authority subject to the control of any of the said Governments.

Certain office-holders, however, are permitted to stand as Presidential candidates. These are:

- The current Vice-President.
- The Governor of any State.
- A Minister of the Union or of any State (Including Prime Minister and Chief Ministers).

In the event that the Vice-President, a State Governor or a Minister is elected President, they are considered to have vacated their previous office on the date they begin serving as President.

Under The Presidential and Vice-Presidential Elections Act, 1952, a candidate to be nominated for the office of president needs 50 electors as proposers and 50 electors as seconders for his name to appear on ballot.

### **Conditions for the Presidency**

Certain conditions, per Article 59 of the Constitution, debar an otherwise eligible citizen from contesting the presidential elections. The conditions are:

- 1. The President shall not be a member of either House of Parliament or of a House of the Legislature of any State, and if a member of either House of Parliament or of a House of the Legislature of any State be elected President, he shall be deemed to have vacated his seat in that House on the date on which he enters upon his office as President.*
- 2. The President shall not hold any other office of profit.*
- 3. The President shall be entitled without payment of rent to the use of his official residences and shall be also entitled to such emoluments, allowances and privileges as may be determined by Parliament by law and until provision in that behalf is so made, such emoluments, allowances and privileges as are specified in the Second Schedule.*
- 4. The emoluments and allowances of the President shall not be diminished during his term of office.*

### **Election process**

Whenever the office becomes vacant, the new President is chosen by an electoral college consisting of the elected members of both houses of Parliament (M.P.s), the elected members of the State Legislative Assemblies (Vidhan Sabha) of all States and the elected members of the legislative assemblies (M.L.A.s) of two Union Territories (i.e., National Capital Territory (NCT) of Delhi and Union Territory of Puducherry). The election process of President is more extensive process than Prime Minister who is also elected indirectly (not elected by people directly) by the Lok Sabha members only. Whereas President being constitutional head with duties to protect, defend and preserve the constitution and rule of law in a constitutional democracy with constitutional supremacy, is elected in an extensive manner by the members of Lok Sabha, Rajya Sabha and state legislative assemblies in a secret ballot procedure.

The nomination of a candidate for election to the office of the President must be subscribed by at least 50 electors as proposers and 50 electors as seconders. Each

candidate has to make a security deposit of ₹ 15,000 (US\$220) in the Reserve Bank of India. The security deposit is liable to be forfeited in case the candidate fails to secure one-sixth of the votes polled.

The election is held in accordance to the system of Proportional representation by means of the Single transferable vote method. The voting takes place by secret ballot system. The manner of election of President is provided by Article 55 of the Constitution.

Each elector casts a different number of votes. The general principle is that the total number of votes cast by Members of Parliament equals the total number of votes cast by State Legislators. Also, legislators from larger states cast more votes than those from smaller states. Finally, the number of legislators in a state matters; if a state has few legislators, then each legislator has more votes; if a state has many legislators, then each legislator has fewer votes.

The actual calculation for votes cast by a particular state is calculated by dividing the state's population by 1000, which is divided again by the number of legislators from the State voting in the Electoral College. This number is the number of votes per legislator in a given state. Every elected member of the parliament enjoys the same number of votes, which may be obtained by dividing the total number of votes assigned to the members of legislative assemblies by the total number of elected representatives of the parliament.

Although Indian presidential elections involve actual voting by MPs and MLAs, they tend to vote for the candidate supported by their respective parties.

### **Oath or affirmation**

The President is required to make and subscribe in the presence of the Chief Justice of India (or in his absence, the senior-most Judge of the Supreme Court), an oath or affirmation that he/she shall protect, preserve and defend the Constitution as follows:

I, (name), do swear in the name of God (or solemnly affirm) that I will faithfully execute the office of President (or discharge the functions of the President) of the Republic of India, and will to the best of my ability preserve, protect and defend the Constitution and the law, and that I will devote myself to the service and well-being of the people of the Republic of India.

### **Process of Impeachment**

The President may be removed before the expiry of the term through impeachment for violating the Constitution of India. The process may start

in either of the two houses of the Parliament. The house initiates the process by leveling the charges against the President. The charges are contained in a notice that has to be signed by at least one quarter of the total members of that house. The notice is sent up to the President and 14 days later, it is taken up for consideration.

A resolution to impeach the President has to be passed by a two-third majority of the total number of members of the originating house. It is then sent to the other house. The other house investigates the charges that have been made. During this process, the President has the right to defend oneself through an authorised counsel. If the second house also approves the charges made by special majority again, the President stands impeached and is deemed to have vacated his/her office from the date when such a resolution stands passed. No president has faced impeachment proceedings so the above provisions have never been used.<sup>[52]</sup>

Under Article 361 of the constitution, though president cannot be summoned for questioning except on his voluntary willingness to testify in the court in support of his controversial deeds, the unconstitutional decisions taken by the president would be declared invalid by the courts. The case would be decided by the courts based on the facts furnished by the union government for the president's role. As clarified by the Supreme Court in the case 'Rameshwar Prasad & Ors vs Union Of India & Anr on 24 January 2006', though president cannot be prosecuted and imprisoned during his term of office, he can be prosecuted after his term of office for the guilty committed during his term of presidency as declared earlier by the courts.<sup>[53]</sup> No president has resigned on impropriety to continue in office for declaring and nullifying his unconstitutional decisions by the courts till now. No criminal case at least on the grounds of disrespecting constitution is lodged till now against former presidents to punish them for their unconstitutional acts though many decisions taken during the term of presidency had been declared by Supreme Court as unconstitutional, mala fides, void, *ultra vires*, etc.

Supreme Court shall inquire and decide regarding *doubts* and *disputes* arising out of or in connection with the election of a President per Article 71(1) of the constitution. Supreme Court can remove the president for the electoral malpractices or upon being not eligible to be Lok Sabha member under the Representation of the People Act, 1951. Subject to Article 71 (3), Parliament made applicable rules/procedure to petition the Supreme Court for resolving the *disputes* only that arise during the election process of the president but not the *doubts* that arise from his unconstitutional actions/deeds or changing Indian citizenship during the tenure of president which may violate the requisite election qualifications

The Office of the President falls vacant in the following scenarios:

1. On the expiry of his/her term
2. By reason of death
3. By reason of resignation
4. Removal by Supreme Court
5. Removal by impeachment

Article 65 of the Indian Constitution says that the Vice-President of India will have to discharge the duties, if the Office falls vacant due to any reason other than expiry of the term. The Vice-President reverts to office when a new President is elected and enters office. When the President is unable to act because of absence, illness or any other cause, the Vice-President discharges the President's functions until the President resumes the duties.

A Vice-President who acts as or discharges the functions of the President has all the powers and immunities of the President and is entitled to the same emoluments as the President. It should be noted here that when the Vice-President discharges the duties of the President, he/she does not function as the Chairperson of the Rajya Sabha.

The Indian Parliament has enacted the law (The President (Discharge of Functions) Act, 1969) for the discharge of the functions of the President when vacancies occur in the offices of the President and of the Vice-President simultaneously, owing to removal, death, resignation of the incumbent or otherwise. In such an eventuality, the Chief Justice, or in his absence, the senior most Judge of the Supreme Court of India available discharges the functions of the President until a newly elected President enters upon his office or a newly elected Vice-President begins to act as President under Article 65 of the Constitution, whichever is the earlier.<sup>[21]:96</sup> For example, in 1969, when President Zakir Husain died in Office, Vice-President V. V. Giri served as the acting President of India. However, later, V.V Giri resigned from both posts (Acting President of India and Vice-President of India) as he became a candidate in the 1969 Presidential election in India. In this event, the then Chief Justice of India, Justice Mohammad Hidayatullah served as the acting President of India until the next President was elected.

## **President versus Chief Justice**

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### **President versus Chief Justice of India**

<b>President</b>	<b>Chief Justice of India/ Judiciary</b>
The duties of President under his oath is to protect, defend and preserve the constitution and the law	Similar to President to uphold the Constitution and the laws (Third Schedule of the constitution) <sup>[11]</sup>
Oath is taken in the presence of the Chief Justice	In the presence of the President
Impeachment by Parliament with majority of not less than two-thirds of the total membership of each House of the Parliament for violation of the Constitution as per Article 61.	Impeachment by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting on the ground of proved misbehavior or incapacity as per Article 124 (4)
President can be removed by the Supreme Court per Article 71(1) for committing electoral malpractices and upon ceasing to possess the requisite qualifications to be president.	President can not remove judges once appointed by him without impeachment process per Article 124 (4).
An individual heads the autonomous institution of President.	Judiciary/Supreme Court is also an autonomous institution represented by team of Supreme Court judges with Chief justice as its chief.
President being head of Parliament, Executive and supreme commander of armed forces is fully empowered by the constitution to fulfil his judicial responsibility. He can also take the expert	Chief Justice/Supreme Court is also empowered by the constitution to repeal the unconstitutional activities of parliament and executive only after a

<p>advise of Attorney General and also Chief Justice in performing his judicial role. It is President's duty to ensure that every state's governance is carried on in accordance with the provisions of the constitution under Articles 355 and 356.</p>	<p>fair trial.</p>
<p>President's prime duty is to prevent unconstitutional decisions of union and state governments and Parliament or state assemblies by denying his compulsory assent for making them in to applicable laws. He is the foremost defender of the constitution who can pre-empt the unconstitutional activities of executive and legislatures. The other duties of President are just ceremonial as head of the country which are attached to him for being protector, defender and preserver of the constitution. The institution of President becomes redundant if the president is confining to other ceremonial duties only.</p>	<p>Can intervene or nullify the unlawful actions of union/state governments and unconstitutional laws enacted by the Parliament or a state legislative after presidential assent only.</p>
<p>President has constitutional immunity for his unconstitutional, mala fides activities during his/her tenure but liable for judicial action / punishment for his unconstitutional activity after the term of presidency. However per Article 361 (1), President is answerable to a court designated by either house of Parliament with two-thirds majority for the investigation of a charge against him under article 61.</p>	<p>Chief justice/Judges of Supreme Court are also immune from punishment for not delivering correct judgments' or for their incompetence and mala fides. However, Judges verdict can be repealed by a higher level bench of other judges.</p>
<p>President can not be recalled by the</p>	<p>Chief justice/Judge of Supreme Court</p>

people of India for not fulfilling his constitutional duties in case Parliament is not impeaching the President or removed by the Supreme Court.	also can not be recalled by the people of India in case Parliament is not impeaching the judges.
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## President versus Prime minister

<b>President versus Prime minister</b>	
<b>President</b>	<b>Prime minister/ Union cabinet</b>
The duties of President under his oath is to protect, defend and preserve the constitution and the law	Swears allegiance to the Constitution of India as by law established, swears to uphold the sovereignty and integrity of India and swears to do right to all manner of people without fear or favour, affection or ill-will (Third Schedule of the constitution) <sup>[11]</sup>
Oath is taken in the presence of the Chief Justice	In the presence of the President
Elected in an extensive manner indirectly by the members of Lok Sabha, Rajya Sabha, and state legislative assemblies in a secret ballot conducted by the Election Commission	Elected indirectly by the Lok Sabha members and secret ballot is not mandatory.
Impeachment by Parliament with majority of not less than two-thirds of the total membership of each House of the Parliament for violation of the Constitution as per Article 61	Steps down upon losing majority support in Lok Sabha.

<p>President can be removed by the Supreme Court per Article 71(1) for committing electoral malpractices and upon ceasing to possess the requisite qualifications to be president</p>	<p>Similar to Prime minister and ministers also.</p>
<p>An individual heads the autonomous institution of President</p>	<p>Union cabinet with Prime minister as its chief is collectively responsible.</p>
<p>President being head of Parliament, Executive and supreme commander of armed forces is fully empowered by the constitution to fulfil his judicial responsibility. He can also take the expert advise of Attorney General and also Chief Justice in performing his judicial role. It is President's duty to ensure that every state's governance is carried on in accordance with the provisions of the constitution under Articles 355 and 356</p>	<p>Rest of the governance of the union and reporting to the President on all important matters. Being leader of the majority/ ruling party in the Parliament, union cabinet takes lead in law making by the parliament needed for policy finalisation on various aspects, annual budgets finalisation, planning and implementation, etc.</p>
<p>President's prime function is to prevent unconstitutional decisions of union and state governments and parliament or state assemblies by denying his compulsory assent/government orders (GO) for making them in to applicable laws. He is the foremost defender of the constitution who can pre-empt the unconstitutional activities of executive and legislatures.</p>	<p>Prime minister /union cabinet shall aid and advise the President who shall, in the exercise of his functions, act in accordance with such advice as long as not unconstitutional. Prime minister shall communicate to the President all decisions of the Council of Ministers relating to the administration of the affairs of the Union and proposals for legislation and on President's desire submit related information. No minister shall decide on any matter without the council of ministers/ union cabinet</p>

	approval per Article 78.
President has constitutional immunity for his unconstitutional, mala fides activities during his/her tenure but liable for judicial action / punishment for his unconstitutional activity after the term of presidency	The union cabinet has constitutional immunity from legal proceedings in any court for their mala fide and unconstitutional advice tendered by union ministers to the President per Article 74 (2).
President cannot escape from his constitutional duty by citing constitutional amendment to Article 74 (para 2 of 1) which makes him to abide by the union cabinet advice after sending for reconsideration. As clarified by the Supreme Court, the object of Article 74 (2) is only to make the question whether the President had followed the advice of the union cabinet or acted contrary thereto, non-justifiable. Refer page Article 74#Court cases for more clarity	The union cabinet may escape from the punishment or responsibility for implementing unconstitutional laws citing Article 74 (2).
President cannot be recalled by the people of India for not fulfilling his constitutional duties in case parliament is not impeaching the President or removed by the Supreme Court or resigns on his own on moral grounds	Prime minister/ union cabinet cannot be recalled by the people of India till the end of his term in case he is not losing majority support in Lok Shaba or resigns on his own on moral grounds.

### Important presidential interventions in the past

The President's role as defender of the Constitution and the powers as Head of State, especially in relation to those exercised by the Prime Minister as leader of the government, have changed over time. In particular, Presidents have made a number of interventions into government and lawmaking, which have established and challenged some conventions concerning Presidential intervention.

### Proving majority in the parliament

In 1979, the Prime Minister, Charan Singh, did not enjoy a Parliamentary majority. He responded to this by simply not advising the President to summon Parliament.<sup>[20]</sup> Since then, Presidents have been more diligent in directing incoming Prime Ministers to convene Parliament and prove their majority within reasonable deadlines (2 to 3 weeks). In the interim period, the Prime Ministers are generally restrained from making policy decisions.

### **Proof of Majority to form a Government**

Since the 1990s, Parliamentary elections have generally not resulted in a single party or group of parties having a distinct majority, until the 2014 Lok Sabha elections when BJP received a clear majority. In such cases, Presidents have used their discretion and directed Prime Ministerial aspirants to establish their credentials before being invited to form the government. Typically, the aspirants have been asked to produce letters from various party leaders, with the signatures of all the MPs who are pledging support to their candidature. This is in addition to the requirement that a Prime Minister prove he has the support of the Lok Sabha (by a vote on the floor of the House) within weeks of being sworn into office.

### **Pocket veto of the Postal Bill**

Since the Indian Constitution does not provide any time limit within which the President is to declare his assent or refusal, the President could exercise a "pocket veto" by not taking any action for an indefinite time. The veto was used in 1986 by the then President Zail Singh over the Postal Bill. The President did not give assent to the bill, arguing that its scope was too sweeping and would give the government arbitrary powers to intercept postal communications indiscriminately.

### **Rashtrapati Bhavan communiqués**

In the late 1990s, President K. R. Narayanan introduced explaining to the nation (by means of Rashtrapati Bhavan communiqués), the thinking that led to the various decisions he took while exercising his discretionary powers; this has led to openness and transparency in the functioning of the President.

### **Offices of Profit Bill**

The constitution gives the President the power to return a bill unsigned but it circumscribes the power to send it back only once for reconsideration. If the Parliament sends back the bill with or without changes, the President is obliged to

sign it. In mid-2006, President Dr.A. P. J. Abdul Kalam sent back a controversial bill regarding the exclusion of certain offices from the scope of 'offices of profit', the holding of which would disqualify a person from being a member of parliament. The combined opposition, the NDA, hailed the move. The UPA chose to send the bill back to the president without any changes and, after 17 days, Kalam gave his assent on 18 August 2006.

### **Sacking state governors**

Arunachal Pradesh governor who was earlier appointed by the ruling party at the centre has been sacked by the President after the Supreme Court has quashed his unconstitutional acts. It is a good act on the part of President by giving a strong message to all state governors that they should not come under the influence of the ruling party at the centre to commit unconstitutional acts.