

### Why we adopted present system of election of the president:

- It would have been **anomalous to have the President elected** by adult suffrage directly by the people and not to give him any real and substantive power.
- The method of **direct election would have been very costly and time consuming.**
- There was also the fear that a directly elected President may emerge, in course of time, as **a centre of power in his own right.**

Therefore, the framers of the Constitution thought that it would be adequate to have the President elected indirectly.

- On the other hand, the framers of the Constitution did not want the President to be **elected merely by Parliament alone as that would have been a very narrow basis, and Parliament being dominated by one political party would have invariably chosen a candidate from that party.**
- In that case, the President **would not have commanded national consensus** in accordance with the system of proportional by an electoral college, consisting of the elected members of both Houses of Parliament and of the State Legislative Assemblies

**We adopted Proportional representation in order to ensure that winning candidates gets returned with absolute majority of votes.**

### Principles of Presidential election:

Firstly,

- As far as practicable, there is **uniformity in the scale of representation of the different States in a presidential election**

Secondly,

- There has to be parity among states and parliament as well.

While deciding a case in 1974, In its advisory opinion in *In re, Presidential Poll*, the Supreme Court has ruled that the **election of the President can be held when a State Assembly has been dissolved under Article 356 and its members are unable to participate in the election.**

Article 71(4) **protects President's election from being challenged on the ground of the existence of any vacancy** for whatever reason among the members of the electoral college electing him.

- All doubts regarding the disputes in the election of president are to heard exclusively in the supreme court and its decision shall be final. Supreme court also has power to frame rules regarding presentation of such petition under Article 145.
- However, it has been held the apex court itself that it shall not entertain any plea with regards to election of president before the completion of electoral process.
- Under section 14 of the Presidential and Vice-Presidential Elections Act, 1952 an election can be called into question either by a candidate at such election or by 10 or more electors. **The Supreme Court has therefore held**

that a person who is neither a candidate nor an elector could not file a petition to challenge the Presidential election.

- If the election of a person as President is declared void by the Supreme Court, acts done by him in exercise and performance of the powers and duties of that office before the court's decision are not invalidated.



**Representation to UTs:** Originally, the elected members of the Legislative Assemblies of Union Territories were not included in the electoral college to elect the President. In *S.K. Singh v V.V. Giri*, (1970)

the Supreme Court had ruled that the term 'State' in Article 54 did not include Union Territories. After the above pronouncement, **the Constitution (Seventieth Amendment) Act, 1992**, added an explanation to Article 54 saying that the term "State" in Articles 54 and 55 includes the National Capital Territory of Delhi and the Union Territory of Puducherry. Thus, the elected members of the Legislative Assemblies of Delhi and Pondicherry now have become part of the electoral college.

**How Votes are valued:**

$$\begin{aligned} \text{MLA vote value} &= \frac{\text{Total Population of State}}{\text{No of MLAs} \times 1000} \\ \text{MP vote value} &= \frac{\text{Total of all MLAs Votes}}{\text{Total No of MPs}} \end{aligned}$$

**Benchmarks of Census for the Year 1971 is taken for counting population of the states.** This has been affected by the 42<sup>nd</sup> Amendment Act. This position shall continue till the data of first census conducted after 2026 is available.

- Along with general elections of Union and State legislatures, the **elections of president and vice-president are also conducted by ECI.**

#### **Condition of Office:**

- He should not be a member of either House of Parliament or a House of the state legislature.
- If any such person is elected as President, he is deemed to have vacated his seat he is deemed to have vacated his seat in that House on the date on which he enters upon his office as President.
- He is entitled without payment of rent to the use of his official residence the Rastrapathi Bhavan.
- He is entitled to such emoluments, allowances and privileges as may be determined by Parliament.
- His emoluments and allowances cannot be diminished during his term of office.

#### **Vacancy in the President's Office:**

A vacancy in the President's office can occur in any of the following Ways:

##### **I. Permanent Vacancy**

- On the expiry of his tenure of five years
- By his resignation
- On his removal by the process of impeachment
- By his death

##### **II. Temporary Vacancy**

- Or otherwise- when he is unfit or unavailable to continue his duties.

<b>If the vacancy created in the office of president is of permanent nature</b>	<b>If the vacancy created in the office of president is of temporary nature</b>
The constitution prescribes in such a situation an election to elect new president shall be conducted within 6 months.	Then vice president takes charge as acting president and continues until the president is able to resume back his duties.
Until then Vice President takes charge as acting president.	In this case Vice President can act for a period more than 6 months.

As per section 3 of **President Discharge of Functions Act 1969**, In the event of the occurrence of vacancies in the offices of both the President and the Vice-President, by reason in each case of death, resignation or removal, or otherwise, **the Chief Justice of India or, in his absence, the senior most Judge of the Supreme Court** of India available shall discharge the functions of the President until a new President elected.

Subject to the provisions of the Constitution, **Parliament is empowered to enact legislation to regulate any matter connected with the election of the President** [Article 71(3)]. Accordingly, Parliament has enacted the Presidential and Vice-Presidential Elections Act, 1952 to carry out the purposes of Article 71(1).

The Act lays down that a candidate can be nominated when at least **50 voters propose him**

**and 50 voters second** him and he deposits a sum of Rs. 50000. This deposit shall be forfeited if the candidate fails to secure at least  $\frac{1}{6}^{\text{th}}$  of the total valid votes.

There is also a condition that **an elector can propose the name of only one candidate in the presidential election.**

In case of election of vice president 20 electors shall propose his nomination and twenty shall second that.

**Schedule for Election:** (Presidential and Vice-Presidential Elections Act, 1952)

1. Notification- Around 60 days before the date of expiration of previous president's tenure.
  2. 14 Days from date of notification- time given to candidates for filing nomination papers.
  3. 1 day is given to returning officer for the scrutiny of nomination papers.
  4. Thereafter 2 days are given for candidates if they want to withdraw the nomination.
  5. Thereafter at least 14 days given to candidates to seek votes and at least after 14 days from last date of withdrawal of application election can be conducted.
- In case of death of any candidate after nomination, returning officer shall report the death to ECI and existing poll procedure shall lapse. A new poll process shall start thereafter.
  - Voting by a proxy is not allowed in the election of the president.

**Grounds on which election of president can be declared void by the supreme court.**

- that the offence of bribery or undue influence at the election has been committed by the winning candidate or by any person with the consent of the returned candidate;
- non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made
- the nomination of any candidate has been wrongly rejected or the nomination of the successful candidate has been wrongly accepted.

**Petitioner can either claim to annul the election or even claim that he himself and not the person who has been elected is duly fit to get elected. In this case if supreme court finds the claims in the petition true, it can elect the petitioner and cancel the previous election.**

**Impeachment of the President**

The President may be removed from his office, before the expiry of his term, for **"violation of the Constitution"** (Only one ground) by the process of impeachment which is given under Article 61 of the constitution.

1. The charge against him may be preferred by either House of Parliament.

2. Any such charges shall be moved only after a 14 days prior notice has been served to the president.
3. The resolution must be passed by a majority of not less than two-thirds of the total membership of the House.
4. Once the resolution has been passed by the house which has framed the charges, the other house shall investigate substance of the charges labelled against the president.
5. Investigation may be made either by the House itself or by some other agency as the House may direct. The President has the right to appear and be represented at such investigation.
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### **Impeachment of President in USA**

The power to impeach **might possibly be invoked in the event of the President acting independently of, or contrary to, ministerial advice, or for “treason, bribery or other high crimes or misdemeanours.”**

**Impeachment is a political instrument;** what constitutes “violation of the Constitution” is a matter to be decided by the House which tries the charge and the House is essentially a political organ.

This provisions seems to be have been inspired from the USA constitution. According to Article II, section 4 of the U.S. Constitution, the President can be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanours. According to Article I, section 3, all impeachments are tried solely by the Senate and when the President is being impeached, the Chief Justice of the Supreme Court is to preside.

**But in procedure the impeachment of president in India has got substantial variation from what is being followed in USA.**

- **The President in India can be impeached only for violation of the Constitution and not for any criminal offence.**
- In India, impeachment can be tried by either of the two Houses of Parliament, and not necessarily by the Upper House [Rajya Sabha].
- There is no provision for the Chief Justice of India to preside at such sittings of the House when the charge against the President is being investigated.

### **Privileges given to the President:**

#### **Personal Immunity for official acts done during tenure:**

- He is not answerable to any court for the exercise and performance of the powers and duties of his office, or for “any act done or purporting to be done by him” in the exercise and performance of those powers and duties.
- No court can compel the President to exercise or not to exercise any power, or to perform or not to perform any duty, nor can a court issue any writ in respect of the President’s official acts or omissions.

- He is not amenable to any mandate, writ, or direction from any court. No court can compel him to show cause or defend his action. In the case of official acts, an absolute immunity from the process of the court is given to the President.

#### **Criminal Immunity:**

- No criminal proceeding whatsoever can be instituted against the President in and no process for the arrest or imprisonment of the President can issue from, any court during his term of office [Article 361(3)]. Thus, no criminal proceedings can be taken against the President even for acts done in his personal capacity.

#### **Limited Civil Immunity:**

- Civil suits can be instituted against the president but that itself can be done only a notice of at least 60 days has been served to the president.
- In civil cases, a distinction is drawn between the President's official or personal acts. In respect of his official acts, an absolute bar has been created against a court action; in respect of his personal acts, there is only a partial bar in so far as a two months' notice needs to be given to him prior to the institution of civil proceedings

#### **Working of the Executive:**

##### **President as Titular Head:**

- **Head of Armed Forces:** Vesting of Supreme command of Armed forces bring the military forces under the civilian control. This helps in removing chances of coup or military rule and also in principles its helpful in ensuring idea of constitutionalism.
- **Head of Union Executive:** According to Article 77(1), all executive action of the Central Government is to be expressed to be taken in the name of the President.
- Though formally vested in the President, the idea could never be that he should personally exercise this power, or take every decision himself. That would be a task physically impossible for him to discharge. It will also be constitutionally undesirable for in a parliamentary system effective powers vest in the Ministers. The Constitution therefore seeks to create a mechanism by which the responsibility for decision making may be passed from the President to others
- For this purpose, a Minister is regarded as an officer subordinate to the President and, therefore, the President can exercise his executive authority through the Ministers.
- Secondly, the President is to **make Rules for the more convenient transaction of the business of the Government** of India and for the allocation of work among the various Minister. Idea here is that the actual administration is run by the Ministers, and not by the President who is a constitutional head, but a Minister cannot, in the very nature of things, take every decision by himself. He does so in the name of the president.

- Thirdly, Parliament may by law confer any function on authorities other than the President. When Parliament does so, the officer concerned can act in his own name.

Hence, president is shall undertake his executive functions only after being advised by the council of ministers. Further, Article 74(2) declares that no court can inquire into the question whether any, and if so what, advice was tendered by the Ministers to the President. **Article 74(2) thus expressly makes advice tendered by the Ministers to the President non-justiciable.**

In **Ram Jawaya Kapoor v Punjab (1955) case**, supreme court has observed that we adopted the parliamentary system on the lines of Britain and hence president acts as titular head. So, it is safe to conclude that the President is the head of the State and only a formal executive. The President is more of a symbol used to formalize the decisions arrived at by the Ministers and the Cabinet. The effective executive power lies with the Prime Minister and the Ministers who constitute the real executive carrying on the entire burden of conducting the administration of the Union.

#### **Judicial Functions:**

- Appoints the Chief Justice and the judges of Supreme Court and high courts.
- Can seek advice from the Supreme Court on any question of law or fact. However, the advice tendered by the Supreme Court is not binding on the President.

**Power to Pardon:** Article 72 empowers the President to grant pardon, reprieve, respite, or remission of punishment, or to suspend, remit or commute the sentence of any person convicted of any offence in all cases.

- **Reprieve** means stay of the execution of sentence.
- **Respite** denotes postponement of execution of a sentence on existence of special reasons.
- **Remission** reduces the amount of a sentence without changing its character and commutation is changing the sentence to a higher penalty of a different form.
- **Commutation** is changing of one form of punishment to less severe form.
- A pardon is an act of grace which **releases a person from punishment for some offence**. A pardon **may be either full, limited, or conditional**. Full pardon wipes out the offence in the eyes of law; a limited pardon relieves the offender from some but not all the consequences of the guilt and a conditional pardon imposes some condition for the pardon to be effective.
- The President acts in this matter on the advice of the Home Minister.

The scope of the power conferred on the President by Article 72 is very extensive. It extends to whole of India. The power to grant pardon may be exercised either before a conviction or by an undertrial prisoner or after the conviction.

Other head superstate in United State or the Great Britain has similar power of granting pardons. In Britain, the Crown enjoys a prerogative to grand pardon to any criminal, but this prerogative is exercised on ministerial advice.



However, the grant of pardon in India is not a prerogative. Rather it is the part of constitutional scheme and structure.

In *Kehar Singh V Union of India*, Supreme Court has held a view that power of **pardon is a part of constitutional scheme and President being the head of the Constitution and enjoying the high status has been invested with this power**. It is a constitutional responsibility of great significance to be exercised when occasion arises in accordance with his discretion contemplated by the context.

The court has further justify is that in any civilised society there can be no attributes more important than life and personal liberty of its member in most civilised societies, the deprivation of personal liberty and threat of the deprivation of life by actions of the state is regarded seriously and therefore records is provided to the judicial organs for its protection. But judiciary is also not infallible and susceptible to errors of human judgment. So it has been found appropriate that in matters concerning life and liberty, the power is vested in some high authority to scrutinise the validity of threatened denial of life.

Though the Supreme Court has itself not prescribed any guidelines, but in the case of *Maru ram*, it has suggested the **government to frame certain guidelines in order to avoid any discrimination**. The court further has explained that no **constitutional power is to be exercised arbitrarily**. Public power given on a high pedestal has to be exercised in a justified manner. All public power, including constitutional power, sell never be exercisable in arbitrary or mala fide way.

In the same case again, The Supreme Court held that the power of the President to grant pardons under Article 72 of the Indian Constitution is not absolute. It is subject to judicial review, and the court can examine the decision on grounds of malafide, arbitrariness, or violation of any constitutional provision. Yet in any case, the Code finds that the power to pardon has been exercised in an irrational, irrelevant and discrimination or malafide way the Court can examine the case and intervene, wherever necessary.

Further, **the Law Commission of India in its report on capital punishment has also justified the existence of prerogative of mercy** in the hands of executive. “There may be many matters which may not have been considered by the courts. The hands of the codes are tied down by the evidence placed before it”.

The US President has the constitutional right to pardon or commute sentences related to federal crimes. The Supreme Court has held that this power is “granted without limit” and cannot be restricted by Congress.

Clemency is a broad executive power that is discretionary — meaning the President is not answerable for his pardons, and does not have to provide a reason for issuing one. But there are a few limitations.



(The Hindu Article on Pardon)



**Question 27. Instances of President's delay in commuting death sentences has come under public debate as denial of justice. Should there be a time limit specified for the President to accept/reject such petitions? Analyse. (PYQ) (To be discussed in class)**



### **Legislative Functions:**

1. Can summon or prorogue the Parliament and dissolve the Lok Sabha.
2. He can also summon a joint sitting of both the Houses of Parliament, which is presided over by the Speaker of the Lok Sabha.
3. Address the Parliament at the commencement of the first session after each general election and the first session of each year.
4. Can appoint any member of the Lok Sabha/RS to preside over its proceedings when the offices of both the Speaker and the Deputy Speaker fall vacant.
5. Nominates 12 members of the Rajya Sabha from amongst persons having special knowledge or practical experience in literature, science, art and social service.
6. Decides on questions as to disqualifications of members of the Parliament, in consultation with the Election Commission except Xth Schedule matters.
7. His prior recommendation or permission is needed to introduce certain types of bills in the Parliament. For example, a bill involving expenditure from the Consolidated Fund of India, or a bill for the alteration of boundaries of states or creation of a new state.
8. He can promulgate ordinances when the Parliament is not in session. These ordinances must be approved by the Parliament within six weeks from its reassembly. He can also withdraw an ordinance at any time.
9. lays the reports of the Comptroller and Auditor General, Union Public Service Commission, Finance Commission, and others, before the Parliament.

### **Financial Powers:**

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### **Ordinance Making Powers:**

An ordinance is only a temporary law. The executive in Britain or the U.S.A. enjoys no such power. Section 72 of the Government of India Act, 1935, authorised the Governor- General to make and promulgate ordinances for the peace and good government of British India 'in cases of emergency.

The technique of issuing an ordinance has been devised with a view to enabling the Executive to meet any unforeseen or urgent situation arising in the country when Parliament is not in session, and which it cannot deal with under the ordinary law.

Article 123 empowers the president to promulgate such ordinances as the circumstances appear to him to require when:

1. **either Houses of Parliament are not** in session
2. he is **satisfied that circumstances** exist which render it necessary for him to take immediate action.

he acts in this matter, as he does in other matters, **on the advice of the Council of Ministers. Ordinance is not the discretionary power of the president.**

the **38th Amendment of the Constitution** had added Art. 123(4) making **satisfaction of the President to issue an ordinance non-justiciable** but later he **44th Amendment** deleted this provision and restored the status quo ante.

The ordinance is to be laid before each House of Parliament when it reconvenes after the making of the ordinance. It shall **cease to operate at the expiry of six weeks** from the assembly of Parliament unless approved.

Period of six weeks is to be reckoned **from the later of the two dates if both houses meet on different dates.**

The ordinance **comes into effect as soon as it is promulgated** and the maximum duration for which an ordinance may last is **six months and six weeks**, as **six months cannot intervene between two sessions of Parliament**, and the ordinance would cease to operate six weeks after the Parliament meet.

An ordinance may cease to have effect even earlier than the prescribed six weeks, if both Houses of Parliament pass resolution disapproving it. **It may be withdrawn by the Executive at any time.**

A similar power is vested under the governors of the state under article 213. Governors of the state can issue ordinance on all those matters where state legislature is empowered to make laws.

**Question 28. Discuss the essential conditions for exercise of the legislative powers by the Governor. Discuss the legality of re-promulgation of ordinances by the Governor without placing them before the Legislature. (PYQ) (To be discussed in class)**

