

# Constitutional Validity of Election of President in India: A Critical Study of Nominal Absolutism in the Era of Separation of Power

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## Abstract:

The Preamble of the Constitution of India in clear words states that India is a republic. As a republic, there is no hereditary king; instead, the President serves as the head of state. According to Dr. B.R. Ambedkar, our President is only a nominal figurehead with no discretion or administrative authority. Only with the assistance and advice of the Council of Ministers does the President execute these functions. The President is the head of Union Executives. Article 53(1) vests in him full executive power of the union. The said powers have been exercised directly by the President or by officers' subordinate to him.

Presidents such as Dr. Rajendra Prasad and Dr. Sarvepalli Radhakrishnan publicly disagreed with the administration on certain policy matters and had enormous power over the government. Hence, a President can intervene on behalf of the citizen against the executive's tyranny and encourage it to change its ways. But the process of election of President as per the provision of the Constitution provide enormous power to the ruling government for electing the President, as a result any government policy, laws, etc. became easy to pass.

This piece of research has been developed to study the position of the President in India with respect power assigned to him. Moreover, this paper has been extended to study separation of power and doctrine of check and balances in the presence of the President. Monarchy although not allowed in Indian politics but the positional supremacy, a President gets must be more impactful and transparent, and this is a target of this paper to examine the same.

**Keywords:** President, Election, figurehead, position, authority, impact.

## 1. INTRODUCTION

### 1.1. Overview

The President of India is elected indirectly by the members of an electoral college consisting of the elected members of both houses of Parliament and the elected members of the State Assemblies.<sup>1</sup> The Election Commission of India (ECI) is the supreme body vested with the powers of superintendence, direction, and control of all aspects of elections to offices of the President and the Vice President of India, both the houses of Parliament (Lok Sabha and Rajya Sabha), State Legislative Assemblies as well as State Legislative Councils and Union Territories Legislative Assemblies. The President is elected based on proportional

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<sup>1</sup> INDIA CONST. art. 54.

representation by means of a single transferable vote system. The President's term of office is five years, and the President can be re-elected for any number of terms.

The position of the President has been called into doubt several times. In theory, we have seen that the President is more than just a figurehead. However, one cannot deny the fact that is currently in effect. Nehru stated in the Constituent Assembly that the President would not have "any real power" but would also not be "a mere figurehead."<sup>2</sup> However, as Prime Minister, he made it clear that he would not tolerate any dissent from the President. As President of the Constituent Assembly, Rajendra Prasad stated that the Constitution does not "lay down that the President is bound to accept the advice given by the cabinet."

It is frequently stated that the Prime Minister is the genuine head of state, while the President is the constitutional head. Some claim that the Prime Minister is the head of the majority party in Parliament's lower chamber or the coalition government. As a result, he wields more power than the President. However, it is also true that the President represents both chambers of Congress and state legislatures. As a result of his substantial representative character, the President has additional constitutional power.<sup>3</sup>

### 1.2. Statement of Problem:

The president of India is considered as a nominal head of the State despite being the chief executive of India and possessing number of other powers vested with him. According to provisions of the Constitution the election of the President of India is conducted by an electoral college comprised of elected members of both Houses of Parliament and State Legislative Assemblies in accordance with the proportional representation system using a single transferable vote by secret ballot. But it is often noticed that the elected president was a candidate of the ruling government. By virtue of which it becomes very easy for a ruling government to get an assent from the president for any policy or bill. Article 246 of the Constitution although marked out the doctrine of Separation of Power in India but the powers, functions and position of the President became an obstacle for check and balance system in India. This paper has been designed to find out answers for following questions:

- a. Whether an indirect election of the President is a formality or is an actual need in a country like India?
- b. Whether the decision taken by the President on aid and advice of the Council of Ministers infringes the status of supremacy of the President?
- c. Whether the function exercised by the President of India follows the doctrine of Separation of Power/ Check and Balance?

## 2. The election procedure of President and backdrop

Several political leaders in India have criticised the President's role as a 'rubber stamp' and 'ceremonial head' with no authority. This revived the debate in India over the powers and status President.<sup>4</sup> The President of India is the mere executive head of the state, according to Article 53(1),<sup>5</sup> and he perform his

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<sup>2</sup> David Van Praagh, *The Greater Game: India's Race with Destiny and China*, Published by McGill-Queen's Press MQUP, 2003, p. 100.

<sup>3</sup> Abhishek Kumar, PRESIDENT: A TITULAR HEAD? ACADEMIKE, (last visited Apr 14, 2023, at 11:00 A.M.), <https://www.lawctopus.com/academike/president-titular-head/>.

<sup>4</sup> [BURNING ISSUE] PRESIDENT OF INDIA: ELECTION, POWERS AND SURROUNDING DEBATES CIVILS DAILY, (last visited Apr 11, 2023, 9:30 A.M.), <https://www.civildaily.com/burning-issue-president-of-india-election-powers-and-surrounding-debates/>

<sup>5</sup> INDIA CONST. art. 53 cl. 1.

duty on aid and advice of his council of ministers, according to Article 74(1).<sup>6</sup> So, based on the precise text of these Articles, the President of India is a nominal head of state, similar to the English Crown.

In the case of *Shamsher Singh v. State of Punjab*<sup>7</sup>, the Apex Court of India held that the Governor and President are only the nominal heads of the state, and when they require satisfaction as required by the Constitution, it is the satisfaction of the Council of Ministers on whose aid and advice they exercise powers and functions. As a result, the judiciary has consistently found that the President has no authority in practise. Furthermore, in the case of *Ram Jawaya Kapur v. State of Punjab*<sup>8</sup>, the Supreme Court declared that while executive powers of the Union are vested in the President under Art. 53(1), there is a Council of Ministers with the Prime Minister at its helm to aid and advise the President in the discharge of his tasks under Art. 75.<sup>9</sup> As a result, the President has become a ceremonial or constitutional head of the executive, but real executive powers are held by the council of ministers.

## 2.1. Election of President in India

The President of India is elected indirectly by an Electoral College using a single transferable vote system and secret ballots under the system of proportional representation. MPs and MLAs vote on the basis of parity and consistency. According to Article 333,<sup>10</sup> each state's Legislative Assembly must have not less than 60 members and not exceeding 500 members. The President of India nominates 12 individuals to serve on the Council of States based on their abilities or knowledge in literature, arts, science, and social service. In total, 238 people represent both the states and the union territories. While the House of People is made up of not exceeding 530 members chosen from state territorial constituencies. They are chosen in a direct election. Whereas the President then chooses maximum of 20 more members from the Union Territories.

The following formula is used to preserve proportionality between the values of the votes:

The value of an MLA vote = to the entire population of the state divided by the number of elected MLAs in that state divided by 1000.<sup>11</sup>

During the presidential election, each voter can only vote once. While MLAs' votes vary from state to state, MPs' votes are always consistent. To keep the State and Union balanced, the total value of MP votes must equal the total value of MLA votes. The candidate who meets or exceeds the winning quota is declared the winner. The formula employed is 'Winning quota= total amount of votes/number of seats plus one.'<sup>12</sup>

During the presidential election, the voter votes for his or her first choice candidate. If the first preference candidate does not meet the winning quota, the vote is immediately transferred to the second preference. The first chosen candidate with the fewest votes is removed, and his or her votes are transferred to the remaining candidates.<sup>13</sup>

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<sup>6</sup> INDIA CONST. art. 74 cl. 2.

<sup>7</sup> *Shamsher Singh v. State of Punjab*, AIR 1974 SC 2192, 2226.

<sup>8</sup> *Jawaya Kapur v. State of Punjab*, AIR 1955 SC 549.

<sup>9</sup> INDIA CONST. art. 75.

<sup>10</sup> INDIA CONST. art 333.

<sup>11</sup> B.M. Sharma, *The President of the Indian Republic*, Jstor, October-December 1950, Vol. 11, No. 4 (October-December 1950), pp. 1-9, <https://www.jstor.org/stable/42743250>.

<sup>12</sup> *Supra* Note 13 at 10.

<sup>13</sup> HOW IS THE PRESIDENT OF INDIA ELECTED: PRESIDENT OF INDIA LST LAW ENTRANCE, (last visited Apr 11, 2023, 10:00 A.M.), <https://www.lawentrance.com/article/election-of-President-of-India.html>.

## 2.2. Rationale for indirect election of President

In the Country like India with a vast population, the government use cabinet system, as a result, a capable leader is required to oversee and govern the country. It would be extremely complicated if Presidents were elected directly. It would be a disaster since the people has no idea how the presidency works or whether the candidate fits the profile of a president. Another disadvantage of the direct election method is that the candidate vying for the presidency will have to campaign across the country with the help of a political party. As a result, there will be severe political instability.

Furthermore, considering India's large population, it would be difficult and impossible for the government to distribute election gear. This will cost the government money and may have an impact on the economy. The indirect election system is a respectable mechanism for India's First Man (who deserves it). The system/method of indirect presidential election also helps states to remain neutral and minimise antagonism.

In the recent presidential election, The BJP-led NDA government has nominated tribal leader Draupadi Murmu, the former governor of Jharkhand, as its candidate for the election, whereas the Opposition, which includes the Congress, Trinamool Congress, and the Nationalist Congress Party, has unanimously nominated Yashwant Sinha. Draupadi Murmu is from Odisha, and with the support of Naveen Patnaik's Biju Janata Dal party, the NDA nominee gets roughly 52% of the vote (around 5,67,000 votes) out of a total of 10,86,431 votes cast. With this, she has a good chance of becoming India's first tribal and youngest President.<sup>14</sup> According to the official statistics, the BJP has 393 MPs, excluding four nominated Rajya Sabha members, out of the present strength of 776 members from both Houses, giving it a comfortable majority. The BJP receives the most votes from the state of Uttar Pradesh, where it has 273 MLAs.<sup>15</sup>

According to Article 71, all doubts and disputes arising out of or in connection with the election of the President or Vice-president shall be inquired into and decided by the Supreme Court of India and such decision will be final.<sup>16</sup> In the case of re, Presidential Election<sup>17</sup>, the holding of the election of the President has been challenged on the ground that the electoral college as enumerated under Article 54 and 56 would be incomplete as the Gujrat State legislative Assembly has been dissolved. The Supreme Court held that election to fill the vacancy in the office of the President must be complete before the expiration of the term of the President having regards to Article 62(1), 54 and 55 of the Constitution irrespective of the fact that at the time of such election the Legislative Assembly of a state was dissolved.

## 3. Validity of the decisions taken by an elected President in India

In a parliamentary form of government, the head of the State is the Constitutional head, and the real executive power is vested with the Council of Ministers.<sup>18</sup> Though the executive is headed by the President in India but the to exercise the executive power the President has to act on the aid and advice of the Council of Ministers. According to Article 52 of the constitution, there shall be a President in the Country and he will be the Head of the state, and Article 53 states that the executive power of the Union shall be vested

<sup>14</sup> NDA'S DROUPADI MURMU VS OPPOSITION'S YASHWANT SINHA: BATTLELINES DRAWN FOR PRESIDENTIAL ELECTION: INDIA NEWS - TIMES OF INDIA THE TIMES OF INDIA, (last visited Apr 18, 2023, at 4:00 P.M.), <https://timesofindia.indiatimes.com/india/ndas-droupadi-murmu-vs-oppositions-yashwant-sinha-battlelines-drawn-for-presidential-election/articleshow/92369532.cms>.

<sup>15</sup> THE ELECTION TO INDIA'S PRESIDENT, THE CRITICAL ASSESSMENT TO ITS CONSTITUTIONAL POSITION, Perfection IAS Official, file:///C:/Users/hp/Downloads/1656165713A4734.pdf.

<sup>16</sup> INDIA CONST. art. 71.

<sup>17</sup> re, Presidential Election, AIR 1974 SC 1982.

<sup>18</sup> Dr. J. N. Pandey, Constitutional Law of India, Central Law Agency, Ed. 57, 2020.

with the President, but again the term ‘executive power’ has not been defined in the Constitution. However, Article 73 provides that the executive power of the Union shall extend to the matter with respect to which The Parliament has power to make laws and includes the exercise of such rights, authorities, and jurisdiction as are exercised by the Govt. of India by virtue of any treaty or agreement.<sup>19</sup>

### 3.1. Powers of the President

According to his oath administered by the President while taking over his office, the primary responsibility of the President is to uphold, defend, and maintain the Indian Constitution and the law.<sup>20</sup> While the Constitution of India recognize and categorize the power of a president in six types, while for the evaluation following are prominent:

#### a. Executive powers:

The Union Executive is led by the President. As a result, all executive powers are exercised in his name. The executive power of President over the Union is extended to subjects over which Parliament has the authority to adopt laws and enter treaties and accords. As the head of the executive, the President chooses Governors of States, Supreme Court and High Court Judges, the Auditor General of India, and many other top officials, such as members of the Finance Commission, Election Commission, Union Public Commission, and so on.<sup>21</sup> The President also appoints the Prime Minister and, with his guidance, the other Union Council of Ministers. But like with all other appointments, the President’s discretion is rarely exercised. Normally, he is obligated to summon the leader of the political party that wins an absolute majority in the Lok Sabha to become Prime Minister and establish the Ministry.

When no single political party obtains a clear absolute majority and, as a result, no Council of Ministers can be constituted without a coalition of parties, the President can use his discretion in naming the Prime Minister with caution. India has entered a coalition political era. And it is possible that no single party will be able to achieve an absolute majority, and the President will be forced to use his discretion in naming Prime Minister for some time to come. As head of state, the President is the ultimate Commander of India's Armed Forces and has the authority to declare war or sign treaties.

#### b. Legislative Powers:

The Parliament of India consists of House of People (lok Sabha), Council of States (Rajya Sabha) and the President. The assent of the President is must to covert a bill into Act in India.<sup>22</sup> But if a bill sent for the assent before the President for second time, the President doesn’t possess the power to withhold the bill as per Article 111.<sup>23</sup> Apart from giving mere assent, he can summon the Council of ministers. According to Article 86(2) in an emergency, the President may also deliver messages to any House or both Houses. Normally, the President would not send such a communication unless he has a major disagreement with the Council of Ministers.<sup>24</sup> The President under Article 123, can also pass an ordinance.<sup>25</sup> The Supreme

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<sup>19</sup> INDIA CONST. art. 73

<sup>20</sup> INDIA CONST. art. 60.

<sup>21</sup> Supra Note 17 at 11.

<sup>22</sup> INDIA CONST. art. 79.

<sup>23</sup> INDIA CONST. art. 111.

<sup>24</sup> INDIA CONST. art. 86 cl. 2.

<sup>25</sup> INDIA CONST. art. 123.

Court of India in the case of A.K. Roy vs. Union of India<sup>26</sup> states that the President's satisfaction must be as to the existence of a circumstance that requires the President to promulgate such Ordinance.

### c. Emergency Powers

When the security of India or any part of it is threatened by war, armed insurrection, or external attack, the President of India may issue a Proclamation of National Emergency. The executive power of the states is to be exercised in line with the orders given by the Central Government during a Proclamation of National Emergency.<sup>27</sup> Whereas, if constitutional machinery of a state fails, the President of India has the authority to issue a proclamation of state emergency to that effect. This type of emergency might last up to three years. During such emergency, the President may seize executive authority over the State. The Union Parliament will exercise the functions of the state legislatures.<sup>28</sup>

Further, If the President believes that India's financial stability is in jeopardy, he may issue a Financial Proclamation. This type of emergency could last for an infinite period of time. The Central Government may issue directives to the states about financial propriety canons. All money measures passed by state legislatures must be reserved for the President's consideration.<sup>29</sup>

### 3.2. Evaluation President's power with doctrine of Separation of Power

The Apex Court of India in the case of Indira Gandhi vs. Raj Narain<sup>30</sup> concluded that the theory of separation of powers has been embraced in a wider sense in the Constitution of India. The American and Australian constitutions, which require a strict separation of powers, are not applicable in India. But the purpose remains same i.e., to establish a check and balance system in India legal framework. The judiciary possess the authority of judicial review in terms of any law made by the Parliament, but the question always exists on the executives whose powers are not properly defined except a glance of Article 73.

The President of India being the head of the executive of the state has also responsibility by default to examine the provisions of the bill addressed before him for the assent. But the President doesn't have option to withhold the bill if it is placed again for the second time for the assent. The rationale given for the same is not strong enough to justify the separation of power. The argument states that The President doesn't have liability on a result of the policy thus framed and it is always the liability of the cabinet. Hence cabinet possess the sole authority for making such laws, which is in a way true but making the constitutional head as mere rubber stamp by means of such practise is not justified and always remains as a point of dispute. The words of Article 111 must be changed with respect to such practise.

### 4. Concluding Remarks:

The Indian Constitution contains numerous provisions that portrays the President of India is more than just a figurehead. True, the President has not done enough of what he should. However, it is important to note that one cannot remark on something only by observing the functionality of a constitutional position as per the current scenario; rather, one must examine the provisions of the Constitution to understand what actually the post is meant for. The President, like the King, has been imbued with a pervasive and persuasive role, constitutionally romanticised.

<sup>26</sup> A.K. Roy vs. Union of India, 1982 AIR 710.

<sup>27</sup> INDIA CONST. art. 352.

<sup>28</sup> INDIA CONST. art. 356.

<sup>29</sup> INDIA CONST. art. 360.

<sup>30</sup> Indira Gandhi vs. Raj Narain, 1975 AIR 2299.

Whereas it is also true that in comparison to the way a President is elected, the authority and functionality of such President in India is not that authoritative. The act of the President is always surrounded by the aid and advice of the Council of Ministers. Moreover, in terms of assenting a bill, the President doesn't provide with any negative option in second chance. Because the Cabinet is in charge of making choices for the government, and the President is not personally liable for the decisions he or she authorises. His withholding power has been restricted to only one attempt. Thus, the first citizen of India run by a group of people whose educational qualifications are also not fixed by the Constitution.

While in terms of Separation of Power and functionality of the President, it is to be noted that the exercise of power the President restricted by advice and decisions of the cabinet whose educational qualifications has not been specified anywhere in the Constitution or any law for the time being in force with respect to the election. Then such an advice whether justified is a question. Also, the educational qualifications of the President are not specified with this regard so mere challenge to the ability of the cabinet to advice is not appropriate as the ability of the person taking the advice also is in question. But in the country with a huge population a President is considered to be the first citizen cannot be based on mere educational qualification rather other factors like leadership quality and ability to manage the executive department also counts. Although the practise is such the post of President has been created just to put a stamp on legal document on behalf of the Republic of India and not otherwise despite of having a constitutional recognition. The Constitution itself limited the power of the President hence only amendment to the provisions only solution.

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