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ECI Appointments: The Supreme Court Judgement and The Upcoming Bill

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ABSTRACT

The article examines the appointment process of the Election Commission of India (ECI) in light of a Supreme Court judgement and an upcoming bill. It discusses the historical background of the ECI's establishment and the constitutional mandate for its independence. The article analyses the old practice of appointments by the President, highlighting concerns of executive influence and allegations of compromised independence. It delves into the Supreme Court's judgement in response to a PIL challenging the appointment process and the subsequent introduction of "The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, 2023." The article outlines key provisions of the bill related to appointments, qualifications, salary, and removal of ECI members. It concludes with a critical assessment of the bill's implications on the ECI's independence and effectiveness in addressing concerns of executive influence in appointments.

Keywords: election, commission, bill, judgement, supreme court.

I. INTRODUCTION

Free and fair elections are the sine qua non of democracy, no real democracy in the past, present or future could exist without holding regular elections. For this purpose various democratic countries around the world have independent bodies that are entrusted with the task of conducting and regulating elections and various other activities interlinked with it. In India, the Election Commission of India (ECI) is a constitutional body entrusted with superintendence, conduct and regulation of elections throughout the territory of India. It was established in 1950 under Article 324 of the Constitution of India. Article 324 gives the power of superintendence, direction and control of preparation of electoral rolls for the conduct of all elections, that is to the houses of parliament, state legislatures as well as the offices of President and Vice-President, to the election commission. Moreover the subsequent clauses of the article deals with its composition, regional commissioners, conditions and tenure of service, removal and other necessary staff of the commission.

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The Supreme Court in its judgement in *T.N. Seshan Chief Election Commissioner...vs Union Of India*² observed on July 14, 1995 that,

“In order to ensure the purity of the election process it was thought by our Constitution-makers that the responsibility to hold free and fair elections in the country should be entrusted to an independent body which would be insulated from political and/or executive interference. It is inherent in a democratic set up that the agency which is entrusted the task of holding elections to the legislatures should be fully insulated so that it can function as an independent agency free from external pressures from the party in power or executive of the day. This objective is achieved by the setting up of an Election Commission, a permanent body, under Article 324(1) of the Constitution.”

Hence the intent of constituent assembly to create a body which is impartial and free from the influence of executive was held to be sacrosanct by the supreme court. However over the years the question on the independence of the election commission has been raised many times and more often than not the commission has found it hard to shake off such allegations.

In 2015, Anoop Baranwal filed a PIL contending that the current system of appointment of CEC and other EC's is unconstitutional and undermines the independence of the commission.

It was in this regard, that the supreme court in 2023 gave its judgement and created a committee to make recommendations to the President for the appointment of members of the election commission, and subsequently the parliament passed, *The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, 2023*.

II. OLD PRACTICE OF APPOINTMENT

Coming to the topic of appointment of CEC and other ECs which has been doing rounds, Article 324(2) provides that the chief election commissioner and other election commissioner shall be appointed by the President, however the constitution makers wanted the matter of appointment to the election commission to be decided by the future parliament and therefore they had added the line that, such appointments shall be subject to any law made by the parliament on this behalf.

H.V. Pataskar, a member of the constituent assembly, made a strong case that the procedure and other details of the election commission should not be provided in the constitution rather he supported an Act to be passed by the central legislature dealing with the procedure and details

² (1995) 4 SCC 611

of the election commission. He was apprehensive of the future and wanted no provisions dealing with the details of the commission in the constitution which was for all time to come. In H.V. Pataskar's words,

“It is not desirable that it should be provided for in the Constitution which is for all time to come. We do not know what conditions may prevail after ten or twenty years. From what is happening in some parts of the country, it is not desirable that our constitution should be burdened with all these details”.

However because of the absence of any law of the parliament until recently, the practice was that, the members were appointed by the President from the names recommended by the Prime Minister. They had a tenure of six year, or up to the age of 65 years, whichever is earlier. Also they enjoyed the same salary and perks as that of a judge of the supreme court.

Clearly this practice had some serious concerns, as the president had to act on the advice of the prime minister and this might lead to exercise of some influence upon the members of the commission, even more so when the members are usually retired IAS officers.

Such allegations of executive influence have become more intense in recent years as the commission is often accused of making election schedules more favourable to the ruling party.

III. THE SUPREME COURT'S JUDGEMENT

1. Anoop Baranwal vs Union of India)³

The old practice was challenged in January of 2015, by Anoop Baranwal who filed a PIL on the ground that the current practice of appointing members of the election commission was unconstitutional and was in violation of Article 324(2), which specifies that the President will appoint the Chief Election Commissioner and Election Commissioners, subject to any laws made by Parliament. The PIL contended that the current practice had degraded the ECI's independence over time, and moreover that Article 324(2) places an expectation upon the parliament to draft a law, which it has not done so far. The petitioners wanted the court to issue directions as to a new method of appointment.

The court in its judgement held that the phrase '*subject to the provisions of any law to be made by the Parliament*' in Article 324(2), demonstrated the intention of the constituent assembly to keep the ECI independent of the executive. Moreover the court observed that absence of law have created a vacuum and there are long pending demands and voices for divesting of the exclusive power of appointment from the executive, "*starting with the Goswami Committee in*

³ W.P.(C) 114/2015

the year 1990, more than three decades ago, the Two Hundred and Fifty-Fifth Central Law Commission Report in 2015 and the Reports, both in the Press and other materials”.

Keeping all this in view court held that the appointment of chief election commissioner and other election commissioners shall be made by the President on the advice of a committee comprised of the Prime Minister, leader of opposition of the lok sabha and in case no leader of Opposition is available, the leader of the largest opposition Party in the Lok Sabha in terms of numerical strength, and the Chief Justice of India. However the court made it clear that it was subject to any relevant future legislation by the parliament.

Another contention of the petitioner was that there should be a separate Secretariat to the Election Commission of India and that its expenditure must be charged on the Consolidated Fund of India. Even though the court admitted that the financial starvation and withdrawal of funds for efficient functioning of the commission, is one of the ways in which the executive can interfere and subjugate the election commission, the court found the matter of independent secretariat to be a matter of policy and refrained from articulation of details with regard to expenditure. However the Court made a fervent appeal to the Union of India/Parliament to consider bringing in the necessary changes so that the Election Commission of India becomes truly independent.

IV. THE BILL

The central government was quick to react to the Supreme Court's judgement in Anoop Baranwal vs Union of India and subsequently it introduced '*The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, 2023*' in the Rajya Sabha on August 10, 2023, which was passed by it on December 12, 2023. Subsequently the Lok Sabha passed the bill on December 21 of the same year. The Bill replaces the *Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991*.

It provides for the appointment, qualifications, salary, and removal of the Chief Election Commissioner (CEC) and other Election Commissioners (ECs).

(A) Appointments

The bill makes provision for a 'Search' and a 'Selection' committee for the purpose of appointments.

According to the Section 2(d) of the Bill, “ ‘*Search Committee*’ means the Search Committee for preparation of panel of persons for consideration for appointment as Chief Election

Commissioner and other Election Commissioners” and according to Section 2(e) of the Bill, “ ‘Selection Committee’ means the Selection Committee that recommends appointment of Chief Election Commissioner and other Election Commissioners”.⁴

Further Section 6 and 7 of the Bill provides for the composition of the ‘Search’ and ‘Selection’ committee, according to these sections the ‘Search’ committee should be headed by the Cabinet Secretary and comprising of two other members not below the rank of Secretary to the Government of India, having knowledge and experience in matters relating to elections. And the ‘Selection’ committee shall consist of the Prime Minister as the chairman, the leader of opposition in the Lok Sabha and a Union Cabinet Minister to be chosen by the Prime Minister. Section 7(1) explains that the chief election commissioner and other election commissioners shall be appointed by the president on the recommendation of this committee.

(B) Qualifications

The bill provides that for a person to be eligible for appointment in the election commission, he must be holding or must have held a post equivalent to the rank of Secretary to the Government of India and shall be persons of integrity, who have knowledge of and experience in management and conduct of elections.

(C) Salary

Section 10(1) of the Bill deals with salaries of the Chief Election Commissioner and other EC’s and provides that the salary, allowances and other conditions of service of the Chief Election Commissioner and other Election Commissioners shall be same as those of the judges of the Supreme Court, which is a change from the earlier version of the Bill which made it equal to the Cabinet Secretary.

(D) Removal

The Bill retains the manner of removal of CEC and ECs as specified in the Constitution under Article 324(5). The CEC may be removed in the same manner and on the same grounds as a Supreme Court Judge. ECs may be removed only upon the recommendation of the CEC.⁵

V. CONCLUSION

The Supreme Court in the case of Anoop Baranwal vs Union of India had reiterated the concerns

⁴ THE CHIEF ELECTION COMMISSIONER AND OTHER ELECTION COMMISSIONERS (APPOINTMENT, CONDITIONS OF SERVICE AND TERM OF OFFICE) BILL, 2023, <https://sansad.in/getFile/BillsTexts/RSBillTexts/PassedRajyaSabha/CRC-CEC-E12132023113818AM.pdf?source=legislation>

⁵ Section 11 of *The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, 2023*.

and the wish of the constituent assembly to keep the election commission independent and free from the executive control, however *'The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, 2023'* seems to be an attempt by the central government to circumvent or rather brush aside the Supreme Court's decision. The new bill fails to instill any confidence in the appointment process of the CEC and the other EC's, the 'Selection committee' it makes provision for replaces the chief justice of india as one of its members, as recommended by the Supreme court in its judgement, with a Union Cabinet Minister that is chosen by the Prime Minister, which raises doubts about the independence of the commission from the executive control and thereby perpetuating already existing practice. Even the Goswami committee report of 1990 and the Law Commission report of 2015, which the court had cited in its judgement, had specified that the Chief Justice should be a member of the Selection Committee.

Even though the supreme court in its judgement had made an appeal to the Union to consider an independent secretariat on the lines of Lok Sabha/Rajya Sabha secretariat as recommended by the 'The Goswami Committee' and the ECI, the Bill has largely ignored any such calls.

Moreover the Bill has not addressed the lack of parity in the removal process and protections provided to the CEC and the EC's even though the ECI has become a multi member body for good.

Another major concern with the Bill is its Section 7(2) which makes the Selection Committee's recommendations to be valid in spite of vacancy or defect in constitution. This might mean that in case of dissolution of the lok sabha there maybe no leader of opposition and the selection committee's recommendation will be valid despite it being only comprised of the Prime Minister and the Cabinet Minister who are in all probability of the same party.

Contrary to the expectations that the Bill would address major concerns regarding appointments of the CEC and other EC'S and would correct the ongoing practice of executive influence and say in the appointments, it has shied away from any such positive change. It seems largely to be an attempt at negating the Supreme court's ruling and thereby allowing the central government to enjoy considerable influence for some time to come.
