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Independence of Autonomous Institutions Study of ECI, CAG In India

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ABSTRACT

The Indian constitutional framework does not adhere to the strict 'separation of powers' as enumerated by Montesque but has a functional overlap between three organs for which independent autonomous bodies such as Election Commission of India(hereafter ECI) and Comptroller and Auditor General of India (hereafter CAG) act as checks and balances. If the government was incharge of conducting elections then certain minority groups would be excluded. The goal is to achieve good governance through administrative justice be it conducting audits or elections. This paper will study the scope of Election Commission of India and how its functions are being curtailed by the legislature and executive. It will also study another constitutional body being Comptroller and Auditor General of India and how the legislature does not fully appreciate the velocity of 'independent body' principle. The study of both these institutions is to analyze how the legislature/government is curtailing the powers of these institutions in performing its functions thereby being in violation of the very intent of forming such agencies.

I. INTRODUCTION

Since administrative law is a study of making the interaction between power and personal liberty, of administrative agencies and citizens respectively, attain an effective equilibrium it can be understood certain independent agencies are put in place to administer arbitrary exercise of power. One such agency would be the election commission of India. One of the goals of this commission would be to reduce the inequalities that exist between different groups of people in a constituency by being an unbiased regulator of free and fair elections, thereby creating a level field for the small man and the state. An important characteristic that enables the Election Commission (hereafter EC) to depart this role is the 'autonomy' that is given by way of a constitutional mandate. EC is able to appropriate funds, operate without political interference, members are appointed by the president but can be removed only by way of statute under which they are appointed, it can appoint its own staff and operate without political interference.[2]

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[2] Selin, J. L, *What Makes an Agency Independent?* 59 AJPS 971, 971–987 (2015).

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II. SCOPE OF ECI

ECI ensures 'free and fair' election and for that reason a legislative framework- The Representation of the People Act 1983was created so that the goal of universal adult sufferage will be attained without tainting any democratic principles. If such an exclusive statute is made for the purpose of maintaining the sanctity of electoral process then, ECI as a constitutional body should not be questioned unless it is acting in an arbitrary manner. In drawing the jurisdiction of the ECI, the supreme court judgment *N. P. Ponnuswami Vs. The Returning Officer*[3], was a landmark judgment in deciding the meaning of election in ''no election shall be called in question except by an election petition'' in Article 329 (b).[4] Article 329(b) is a constitutional provision that bars court intervention in electoral matters, in that it gives plenary powers to an independently functioning election commission to conduct elections. The appellant's nomination paper were rejected by the Returning officer of the constituency in which he contested and this was argued by the appellant to be an arbitrary use of powers. After it was decided what the term 'election' would entail, the court went on to demarcate the scope and boundaries of ECI which is essential to safeguard the autonomy of ECI and in essence to allow the ECI to conducts its role towards good governance.

It is known that "election" is referred to the entire process which consists of several stages and embraces many steps, some of the stages which have a direct effect on the final result, until the candidate is returned to the legislature by way of getting elected (*N.P. Ponnuswami v. Returning Officer, 1952*). Now it was before the court to decide whether the Highcourt of Madras could entertain writ petitions under Article 226 with matters concerning the election. Supreme court held that if the High court was allowed to hear matters pertaining to elections, that would be in violation of Part XV of the Constitution and the Representation of the People Act, since the words 'Notwithstanding anything in this Constitution' are clear enough to exclude the jurisdiction of High court. The court gave significant importance to S.100, 105, 170 Representation of the People Act, to infer that the necessary safeguards for improper rejection is provided for and is to be heard before the Tribunal, of whose decision will be conclusive, and also that any Civil court will not have jurisdiction with respect to the decision of Returning officer during the pendency of election. The autonomy of ECI is sanctioned by the legislature by way of creating ROPA, hence the rule of law suggests that the highest authority in matters within the ambit of election is ECI, so the dominance of the High court will be against the

[3] N.P. Ponnuswami v. Returning Officer, 1952 S.C.R. 218 (India).
[4] INDIA CONST. art. 329, cl. b.

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doctrine. The court answered the issue of hierarchy between ROPA and the constitution and which would prevail by saying, "*where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.*" (*N.P. Ponnuswami v. Returning Officer, 1952*). This observation of the Supreme Court can be understood to be flowing from the Basic structure doctrine of separation of powers, since the Supreme court is clear in analysing where judiciary's role stops and where the legislature's role begins. ECI acting under the legislative guise of ROPA is performing a quasi-legislative function and the Supreme court is right in not interfering with another organ of the government.

In *Mohinder Singh Gill Vs. The Chief Election Commissioner*[5], the issue was whether S,100 of Representation of People act, 1951 acted as a complete ban to any issues raised during the pendency of election and therefore order for cancelling old polls and order for re-poll by the Chief election commissioner due to the destruction of ballot papers during a riot, will be barred to be heard by the Supreme court. This judgement has clarified the powers vested in the election commission by reading together S.14 and 66 of ROPA to say that during the entire duration of the election the commission is authorised to exercise its plenary authority, and if such powers are exercised in an arbitrary manner then such matter will be heard by a tribunal according to S.98 of the Act and Article 329. It is to be understood that an election commission operating within the constitutional scheme in truth and substance since law demands of exercise of power in faithful trust, in a proper, regular, fair and reasonable manner will not be considered invalid(*Mohinder v CEC,* 1977). Moreover, the ambit of Article 324 is wide enough and is entrusted to the election commission with a view to facilitating free and fair elections without unwanted hassles. Therefore, if there is an area not covered by Article 324 then ECI is within its statutory authority to take decisions independently.

III. JUDICIAL REVIEW OF ELECTION COMMISSION OF INDIA

In *Sheshan v Union of India*[6], the petitioner being the then Cheif election commissioner challenged the appointment of two additional election commissioner via writ petion to the Supreme court to be *ultra vires* the constitution. The ordinance promulgated by the president placed the Chief Election Commissioner and other Election Commissioners, placed at par in matters of decision making, salary, etc. the petitioners case was that this power by the president was malafide against the President/government. The supreme court read Article 324(2) to express the legislative intent of the law makers to have empowerd the president to appoint

[5] Mohinder Singh Gill v. The Chief Election Commissioner, New Delhi, (1978) 1 S.C.C. 405 (India).
[6] T.N. Seshan, Chief Election commissioner of India v. Union of India , (1995) 4 S.C.C. 611 (India).

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election commissioners as it sees fit, owing to the increase in electoral burden in the future. The court cited *Dhanoa v Union of India*[7], saying that the unfettered powers vested in an autonomous agency such as ECI should be counter-balanced by having more than one member thereby reducing any irrationality that could arise. Such interferences from the executive to appoint and dismiss election commissioners makes the quasi-judicial function of the autonomous institution pointless. The ECI is founded on the principle to act independent of legislature and executive for the purpose that it can keep a check on the members of the parliament and state legislatures.

The *male fide* contention made by the petitioner in *Sheshan* against the president/council of members was answered hastily by the supreme court. Seshan's decorum rather that the merits of his contentions were being focussed on by the SC making the precedent questionable on certain matters. The SC observed that the ordinance by the president by virtue of Article 123 cannot constitute malice but it failed to clarify its stance on why it cannot constitute malice when the president's order was issued under Article 324(2).[8] The main issue to be focussed upon is not the appointment of multi-member election commissioners but whether such appointment must be done by the executive thereby giving unfettered discretion to the ruling party to have violate the very autonomy for which ECI was bough in place. *Sheshan* judgement has failed to give reasons why mala fide contention of the petitioner is untenable but has only observed that "*if the Government thought that a multi-member body was desirable, the Government certainly was not wrong and its action cannot be described as mala fide. Subsequent events would suggest that the Government was wholly justified in creating a multi-member Commission*."(*T.N. Seshan v. Union of India*, 1995). The Supreme court's observation that a multi-member commission is desirable or is a good policy reform is not an answer to the *mala fide* contention of Sheshan.[9]

It should be noted that Seshan as an election commissioner did not act arbitrararily under the statute governing him, but still the Supreme court took it upon itself to intervene in goodwill of the ECI i.e., to reduce the workload of Chief Election Commissioner seems to render autonomy of ECI redundant. This defacto appointment by the government under the guise of president will create eproblems of distrust within the public, because the precedent set by

[7] S.S. Dhanoa v. Union of India, (1991) 3 S.C.C. 584 (India).
[8] Ramaswamy R. Iyer, *The Election Commission and the Judgment,* 31 EPW 37, 37–42 (1996).
[9] Aditya Prasanna Bhattacharya, Contextualising Ashok Lavasa's dissents: A legal history of T.N. Seshan v Union of India, LAW SCHOOL POLICY REVIEW & KAUTILYA SOCIETY (May 8, 2019), https://lawschoolpolicyreview.com/2019/05/08/contextualising-ashok-lavasas-dissents-a-legal-history-of-t-n-seshan-v-union-of-india/

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Seshan is that the reason for appointing EC's to the ECI is not necessary. Apart from the benevolent gesture argument made by the government that this appointment is to ad the CEC, the more dangerous concern would be the arbitrary exercise of Article 324(2). Whenever there is discomfort for the ruling party with the CEC, it can appoint an election commissioner to dilute or even over rule CEC's authority. It can be safely contended that by virtue of Article 324 the Commission is empowered to evolve its own procedure and rules of functioning, and when the need arises that for the CEC to reduce the work load then it can exercise its legitimate powers to fulfill that need. An independent constitutional body is set up for its exclusive technical knowledge in electoral functions and therefore the government might be incompetent to intervene by way of Legislation(Review, 2022).

Article 324(5) dealing with service and tenure of ECs and CECs provide that CEC can be removed only through a process of impeachment like a Supreme Court judge but ECs can be removed by the President at the recommendation of the CEC.[10] This brings in the perils of having a legislative override in the operation of Election Commission since every ruling party is given an opportunity to shuffle EC's if they are not favourable to their agenda. The temporary service commission of EC also might make it difficult for ECs to be objective when dealing with sensitive problems, particularly those involving high-ranking government officials and major political parties and the consequence could be that they won't be able to make decisions without being in 'fear or favour' of the executives.[11]

IV. INDEPENDENCE OF COMPTROLLER AND AUDITOR GENERAL

Article 148 provides that the Comptroller and Auditor General is appointed by the president and be removed from office only by impeachment much like how the Supreme Court judge would be removed, but the tenure of a judge according to Article 217 is 62 years but that of CAG is only 6 years according to S.4 of Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act 1971. CAG performs a quasi-judical role by having checks on the executive by monitoring expenditures, by making sure that money shown in the audits was legally available, spent for the right purpose, and the authority authorised to spend the money was legally authorised to do so according to constitutional norms. The main purpose of audit report is to oversee the technical soundness of financial transactions by ensuring that there is no mis-utilisation and waste of funds on how government utilises tax payers money.[12] The CAG prepares a report on the expenditures which is then submitted before various committees of

[10] INDIA CONST. art. 324. cl. (5).
[11] Association For Democratic Reforms v. Union Of India, A.I.R. 2001 Delhi 126 (India).
[12] Kumar, Jeevan, *Audit and Accountability in Indian Administration*, 62 IJPS 75, 75–89 (2001).

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parliament or state assembly such as Public Accounts Committee, and action will be taken only after its scruitnised whether the audit is acceptable.

Even though CAG is an independent constitutional authority for the purpose that it should work without fear or favour, but whether these reports placed before the parliament are swayed by ruling party is something which could itself render the exercise of parliamentary control over finances and audit meaningless . Eventhough it has a high functioning constitutional authority the reports of CAG are not appreciated to the full extent and this culture had changed during the introduction of anti-corruption movements. With the advent of 2g spectrum and coal reports submitted by the CAG it is said that the CAG could have the potential to transform into a 'watchdog'.[13] The report demonstrated a huge lack of transparency, use of arbitrary powers to allocate resources and ignoring valid recommendations on setting price from legal authorities all of which led to loses amounting to many billions. From the finding of its own report CAG took the liberty to provide policy advice for instance on how to allot and utilize scarce resources in coal report so that transparency and objectivity are realized.

A. Raja, Minister of Telecom industry issued 122 licenses at the price of 2001 rates in 2008, the many allegations were for the illegal and blatant violation of TRAI Act and by-passing recommendations made by Telecom Regulatory Authority of India and Prime minister while maintaining in the public domain that all the processes were conducted in a manner laid down in law. cants. The report disclosed a "presumptive loss" to the exchequer on the spectrum allocation to be Rs 1.76 trillion. CAG in its report aimed to create accountability and transparency in the operation of executives powers who act in blatant violation of statutory provisions to the detriment of the common people. When such an audit is said to have fallacies, then that deters the entire principle of autonomy of the constitutional body. It was observed in *Association of Unified Tele Services Providers vs Union of India*[14] or famously known as the Telecom judgment that, "*Duties and powers conferred by the Constitution on the CAG under Article 149 cannot be taken away by the Parliament, being the basic structure of our Constitution, like Parliamentary democracy, independence of judiciary, rule of law, judicial review, unity and integrity of the country, secular and federal character of the Constitution, and so on*.". Article 149 confers powers to CAG to 'perform such duties and exercise such powers in relation to the accounts of the Union and of the States' and such a power should include the opportunity for the CAG to advocate against parliamentary opposition to matters in the report.

[13] Sen, R., *Going Beyond Mere Accounting: The Changing Role of India's Auditor Genera*l, *72*(4) JAS 801, 801–1035 (2013).
[14] Association of Unified Tele Services Providers vs Union of India, 2019(14) SCALE 513 (India).

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If this sole function of accountability is deprived from the CAG then the need for having an entity that protects the nation from perils of corruption and fraud is lost in its entirety. The question then arises what kind of parliamentary democracy is being postulated if a constitutional body accounting for the actions of executives is being thwarted. A clear hierarchy is observed between legislature and CAG a constitutional body due to the arbitrary bypassing of CAG reports with the reason that it does not confer with the likes of the government. The role of CAG must be made much stronger. It should transform into not just an assistant or a friend of the legislature but a facilitator of good governance in the independence of the legislature.

V. CONCLUSION

ECI being accorded the term most powerful poll watchdog because it enjoys almost unbridled powers in its own field, should be put to re-examination given that it's only working under a facade of parliamentary democracy. In reality, its independence is curbed and reviewed constantly by the judiciary and legislature. Creating a collegium for the appointment of ECs and the CAG is a good way to instil public belief in the autonomous agencies.

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