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Analysing the Appointment of Election Commissioner

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The article discusses the ongoing case in the Supreme Court challenging the appointment procedure of the Election Commissioner. ECI being a constitutional body needs to have a transparent system for maintaining the independence of the institution. The article in detail analysis the procedure for the appointment of the election commissioner, starting with the constitutional provision of EC, it explores the tenures of the past appointment election commissioners. The article also traces the evolution of the procedure of ECI from the time of the constitutional draft to the existing amendment procedure. This also highlights the issue of short tenures impacting the independence of ECI. The article concludes by suggesting and justifying the need for a transparent system to appoint ECI. In the end, the entire issue of the appointment is finely concluded by a few suggestions.

Keywords: *election commissioner, appointment procedure, article 329, tenure, independence.*

BACKGROUND

The President of the country Droupadi Murmu on November 19 appointed ex-IAS officer Arun Goel (1985 batch) as the Election Commissioner filling up the vacancy impending since May 2022.¹ The Supreme Court has received petitions challenging the process of appointment of

¹ 'Shri Arun Goel takes over as new Election Commissioner' (PIB, 21 November 2022)
<<https://pib.gov.in/PressReleseDetailm.aspx?PRID=1877681>> accessed 01 December 2022

election commissioner. It was informed to the court that Goel's retirement was due on December 31 2022 but he received voluntary retirement on November 18 just a day before his appointment. Therefore, the Supreme court has challenged the "haste" and "tearing hurry" in the appointment. It has directed the centre to present a relevant file explaining the mechanism for appointing Goel at this "lighting speed" of 24 hours. The five-member constitutional bench hearing these petitions has questioned the centre over the criteria for shortlisting the candidates for recommendation to the President seeking approval for appointment as the election commissioner.² The ongoing hearing before the court has emphasized the need for having a transparent mechanism for the appointment of an Election commissioner to maintain the independence of the constitutional body.

THE ELECTION COMMISSION OF INDIA

The election commission is a constitutionally empowered body set up to conduct free and impartial elections at both the central and the state levels. It holds regular elections to Lok Sabha, Rajya Sabha, state legislative bodies, and for the position of President and Vice President of the country.³ Initially, when the commission was constituted in 1950 it was a single-member body with the CEC as its only member. In 1989 it was expanded and two additional commissioners were appointed during general elections. However, they were appointed for a very short term and removed by the President on 1 January 1990, but on the same day The Election Commissioner Amendment Act, 1989 was passed changing the nature of this body from a single-member to a multi-member institution. Once again in October 1989, two other ECs were appointed to assist CEC. Since then, this body had remained a multi-member institution constituting one Chief Election Commissioner (CEC) and two additional Election Commissioners (EC).⁴

² Gauri Kashyap, 'SCO Shorts: Challenge to Appointments in the Election Commission of India' (*Supreme Court Observer*, 24 November 2022) <<https://www.scobserver.in/journal/sco-shorts-challenge-to-appointment>> accessed 10 December 2022

³ 'About Election Commission of India' (ECI) <<https://eci.gov.in/about/about-eci/>> accessed 02 December 2022

⁴ Lalsangzuala Khiantge, 'Election Commission of India: Changing role and functions' (*Mizoram University*, November 2018)

CONSTITUTIONAL PROVISION FOR APPOINTMENT OF ECI

Part XV of the Indian constitution talks about the election procedure and the commencement of ECI responsible to conduct impartial nationwide elections to all the important bodies. Article 324⁵ to Article 329⁶ mention provisions for the Election Commission. Article 324(1) empowers the ECI with the powers to conduct elections to all the important legislative bodies including the election for the President and Vice President of the country. It gives the power to supervise, direct and control the preparation of the electoral rolls for the conduct of elections.⁷ Clause 2 of Article 324, specifically, mentions the size of the commission which shall consist of one CEC and other commissioners as the President may find necessary to fix timely, and the appointment shall be made by the President subject to any law in that regard passed by the parliament.⁸

Clause 5 of this article talks about the service condition and the duration of the election commissioners or regional officers if any are appointed. It provides the President with the power to remove, conditional removal should be in a similar manner and on similar grounds to that of the Supreme Court judges. This removal should also be based on the recommendation of the CEC.⁹

APPOINTMENT AND TENURE OF CEC & ECs

The power to appoint CEC and ECs lies within the hands of the President as per article 324(2) of the constitution.¹⁰ There is no special law for the appointment of ECs but following the procedure under the Transaction of Business Rules 1991, presently they are appointed by the President as per the recommendation of the Prime Minister and the Council of Ministers and following the principle of seniority the senior among the two ECs goes on to become the CEC.

<<http://14.139.116.8:8080/jspui/bitstream/123456789/771/1/LALSANGZUALA%20KHIANGTE%20%2CPA.pdf>> accessed 12 December 2022

⁵ Constitution of India 1950, art. 324

⁶ Constitution of India 1950, art. 329

⁷ Constitution of India 1950, art. 324(1)

⁸ Constitution of India 1950, art. 324(2)

⁹ Constitution of India 1950, art. 324(5)

¹⁰ *Ibid*

The tenure of ECI is not fixed by the Constitution. On 16 October 1989, the President with the power under article 324 (5) made rules to fix tenure that an election commissioner can hold office for five years or until he attains the age of 65 years whichever happens earlier. However, this notification was rescinded on 1 January 1990. Later parliament passed The Election Commission (Conditions of Service of Election Commissioners and Transaction of Business)] Act, 1991 which fixed the tenure. Section 4 of the act fixes the tenure of the CEC and other ECs for a term of six years from the date on which he assumes his office.¹¹ But this act was later amended through an ordinance in 1993 whereby amending section 4, a provision of a retirement age of sixty-five years for both the CEC and other election commissioners was added.¹²

ANALYZING THE TENURES OF CECS

The tenures of CECs dropped sharply from over eight years in the 1950s to just a few hundred days and since 2004, where no one has served their full tenure. After the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act of 1991, it was only T. N. Seshan served a tenure of complete six years. After him, only a few could complete the tenure of a few years while others retired after serving the office for over a few hundred days. The tenures of CECs have shortened in coming years which is destroying the independence of the institution.

Supreme Court had constituted a five-judge constitutional bench to look into the reason for the short tenures of the CECs. Tracing the tenures of the past CECs with the parties in governance Justice Joseph mentioned that the UPA government had six CECs in ten years and the present government after coming into power in 2015 had eight CECs in just seven years. This is a “disturbing trend” which implies that there is no system of checks and balances over the appointment process. Successive governments are choosing people of age whose retirement comes well before completing the tenure of six years. The bench had also put forward that the “silence of the constitution” having no law over the appointment of the CEC and Election

¹¹ Election Commission (Conditions of Service of Election Commissioners and Transaction of Business)] Act 1991

¹² Election Commission (Conditions of Service of Election Commissioners and Transaction of Business)] Amendment Act 1993

Commissioner is being exploited and the government is paying 'lip service' to the independence of the poll panel.

RELATION BETWEEN TENURE AND INDEPENDENCE OF THE INSTITUTION

Any institution functions well when it is given the time as prescribed. Since there is no law providing for a mechanism to appoint members of the ECI, this is hampering the independence of the institution. If the commissioners are in office for only short tenures there is no relevance to the advantages and benefits provided to them.¹³ In 1989 in the case of *S.S. Dhanoa v Union of India and Ors*¹⁴ the importance independence of the Election Commission was highlighted whereby it was mentioned:

"...it is urged that the Election Commission is an independent body and its independence is vital to free and fair elections which are a sine qua non for democracy. Any interference with the working of the Election Commission directly or indirectly is bound to have an adverse, effect on the health of our democracy. Hence, it is of paramount importance to the democracy enshrined in our Constitution that its independence is not eroded in any manner."

Independence of the Election Commission is of utmost importance even while drafting the constitution Dr. B R Ambedkar in his speech emphasized having an independent and powerful Election commission that is enshrined to do the great task of conducting elections, which is the most essential element of democracy.

"If the object of this House (Constituent Assembly) is that all matters relating to elections should be outside the control of the Executive Government of the day, it is necessary that the new machinery which we are setting up, namely the Election Commission, should be irremovable by the Executive, by a mere fiat."

In recent years it has been noticed that Government tends to appoint officers who are nearing their retirement knowing the fact that in this way they will get a short time to serve in the office.

¹³ *Ibid*

¹⁴ *S.S. Dhanoa v Union of India & Ors* (1991) SCR (3) 159

The present-day appointment system resting the entire appointment power in the hands of the executive has made this commission a branch of the executive. Consequently, it dismantles the independence of the institution by the government appointing only people loyal to them.

NEED FOR A TRANSPARENT SYSTEM OF APPOINTMENT

The present system of appointment as has been advocated by many former CECs lacks neutrality due to its clandestine nature of the appointment and thus, needs reformation. A need to fill the vacuum created by the lack of any specific law for appointments has also been felt in recent years due to instances of abuse of power by the executive. About this, suggestions have been made to bring in a collegium-like system of appointment as it exists for the appointment of judges and some other non-constitutional bodies like CBI.¹⁵ For the first time in 1973, Justice Tarkunde Committee suggested making the appointment by the president on the advice of a committee consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha, and the CJI.

The need for an independent selection committee was reverberated by the Goswami committee in 1990. Upon recommendation by this committee, the 70th constitutional amendment bill demanding a separate selection committee consisting of Presiding Officers of both Houses and the Leader of the Opposition in Lok Sabha was introduced in the parliament but was later withdrawn in 1993 due to lack of political support. The II ARC in its 4th report in January 2007 also suggested an entire collegium having the PM, Lok Sabha speaker, leader of the opposition, the law minister, and the deputy chairman of Rajya Sabha as its member recommending name to the president for approval. The 255th Law commission report suggesting election reforms also made a similar recommendation emphasizing the need to bring a three-member collegium for the appointment of EC. Apart from the Prime Minister, it shall also include the leader of the opposition and CJI as its member which will make the appointment more transparent.¹⁶

¹⁵ Tushar Kohli 'Making sense of the Election Commissioners' appointment case before the Supreme Court' (*The Leaflet*, 05 December 2022) <<https://theleaflet.in/making-sense-of-the-election-commission>> accessed 08 December 2022

¹⁶ Law Commission of India, *Electoral Reforms* (Law Com No 255, 2015) 6.12.5 <<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf>> accessed 06 December 2022

A writ petition named *Anoop Baranwal v Union of India*¹⁷ was also filed in 2015, in the Apex Court requesting it to direct the legislature to make a transparent body for the appointment of the ECI. The Supreme Court has been hearing the request for a long time now and the need for an independent body had arisen time and again. Since the issue pertains to making amendments to the constitution, the case is under hearing by a constitutional bench waiting for a verdict.¹⁸ Collegium's system of appointment by the means of including government and opposition in the selection process increases public trust in the institution. It makes the system more transparent through third-party involvement which maintains the check over the selection process and ensures that the deserving person gets selected.

Holding impartial elections is an essential facet of democracy and in a democratic nation like India independence of the commission is a required condition to maintain public confidence in the country's democracy. This responsibility should rest in the hands of an independent and neutral body protected from any political or executive interference. It not only conducts elections but also acts as a judicial institution to resolve disputes between parties and regarding recognition granted to political parties. Resting all the appointment powers in the hands of the executive gives them unrestricted power to choose people loyal to them which further destroys the essence of an unbiased election.¹⁹

CONCLUSION

The ECI has witnessed huge transitions since its inception. Evolving from a single-member body to a commission of three members ECI has been expanded. ECI since its inception has functioned well and smoothly conducted many elections in the country gaining international recognition for its work. However, the short tenures and the appointment procedure of its member has been under challenge for a long time. Due to the lack of a specific law regarding the appointment of

¹⁷ *Anoop Baranwal v Union of India* Writ Petition (Civil) 104/2015

¹⁸ 'Election Commission Appointments - Anoop Baranwal v Union of India' (*Supreme Court Observer*) <<https://www.scobserver.in/cases/anoop-baranwal-v-union-of-india-election>> accessed 18 December 2022

¹⁹ 'ADR Moves Supreme Court Seeking Independent Collegium For Appointment Of Election Commission Members' (*Live Law*, 17 May 2021) <https://www.livelaw.in/pdf_upload/adr-moves-supreme-court-independent-collegium-appointment-of-election-commission-members-393567.pdf> accessed 20 December 2022

its member, the independence of the institution is jeopardized. Many ECs serve a very short term in office retiring early.

The concentration of all appointment powers in the hands of the executive call for an independent system of appointment to maintain public confidence in ECI. Some former CEC has advocated bringing in a collegium-like system for an appointment which would bring an overhaul in the unilateral system of appointment. But there are also former CEC who believe in the continuance of the present system of appointment arguing that appointment is purely an executive function and shall not have involvement of CJI. Independence of the institution is of utmost importance for democracy to survive therefore actions should be taken to maintain the independence and integrity of ECI. All that is necessary should be done to preserve the impartial nature of the body.