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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

THE CEC BILL 2023 AND THE DOCTRINE OF BASIC STRUCTURE: A CONSTITUTIONAL ANALYSIS

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Abstract

The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, 2023 (“CEC Bill, 2023”) marks a critical turning point in India’s constitutional discourse. By restructuring the process for appointing the Chief Election Commissioner (CEC) and Election Commissioners (ECs), and by revising their service conditions, the Bill raises fundamental questions about the independence of the Election Commission of India (ECI).

The Bill establishes a three-member selection panel comprising the Prime Minister, a Union Cabinet Minister nominated by the Prime Minister, and the Leader of Opposition in the Lok Sabha. This panel replaces the interim mechanism established by the Supreme Court in *Anoop Baranwal v. Union of India* (2023), which had included the Chief Justice of India (CJI) to ensure judicial oversight. The Bill also downgrades the service conditions of Commissioners from parity with Judges of the Supreme Court to equivalence with the Cabinet Secretary.

These changes are not merely administrative adjustments; they have deep constitutional implications. By granting the executive effective dominance in appointments and diminishing the stature of Commissioners, the Bill potentially compromises the Commission’s neutrality. Given that free and fair elections are part of the basic structure of the Constitution, as held in *Indira Gandhi v. Raj Narain* (1975), the Bill invites serious scrutiny under the basic structure doctrine.

This paper examines the constitutional implications of the CEC Bill, 2023. It begins by tracing the historical evolution of the Election Commission and its service conditions. It then outlines

the Bill's key features before analyzing them against the basic structure doctrine. A detailed judicial overview situates the Bill within the Supreme Court's jurisprudence on democracy and institutional independence. The paper also draws parallels with the National Judicial Appointments Commission (NJAC) case (2015), in which executive involvement in judicial appointments was struck down as unconstitutional. Comparative perspectives from other jurisdictions are explored to highlight best practices. The article concludes that the Bill, in its present form, threatens the independence of the Election Commission and thereby risks undermining India's democratic foundations.

Keywords: CEC Bill 2023, Election Commission of India, Basic Structure Doctrine, Free and Fair Elections, Judicial Independence, NJAC Judgment, Article 324, Constitutional Law, Democratic Institutions, Service Conditions

Introduction

Elections are the beating heart of democracy. They are the means through which the will of the people is expressed and governments derive legitimacy. But elections are meaningful only if they are free, fair, and impartial. In India, the Election Commission of India (ECI) was created under Article 324 of the Constitution to ensure precisely this.

The framers of the Constitution recognized the dangers of allowing the executive to control elections. As Dr. B.R. Ambedkar explained in the Constituent Assembly, the Election Commission had to be independent of government influence because the government itself would be a contestant in elections. A referee cannot be chosen by one of the players without undermining the credibility of the game.

For decades, the ECI has been celebrated as one of India's most trusted institutions. Its reputation was strengthened by leaders like T.N. Seshan, who transformed the Commission into a proactive guardian of electoral integrity in the 1990s. The 1991 Act that gave Election Commissioners parity in service conditions with Judges of the Supreme Court symbolized this independence.

It is against this background that the CEC Bill, 2023 must be understood. The Bill makes two major changes:

1. **Appointment Panel:** It creates a three-member committee (Prime Minister, nominated

Cabinet Minister, and Leader of Opposition in Lok Sabha) to select Commissioners.

This replaces the interim arrangement directed by the Supreme Court in Anoop Baranwal (2023), which included the Chief Justice of India.

2. Service Conditions: It downgrades the Commissioners' status from parity with Supreme Court Judges to parity with the Cabinet Secretary.

Critics argue that these changes compromise the Commission's independence and violate the basic structure of the Constitution, which requires free and fair elections. The situation is reminiscent of the NJAC case (2015), where the Court struck down a constitutional amendment giving the executive a role in judicial appointments. Just as judicial independence is essential to the rule of law, electoral independence is essential to democracy.

This article explores whether the CEC Bill, 2023, in its present form, passes the test of constitutional validity.

Historical Background of the Election Commission of India

The Election Commission was established on 25 January 1950 as a single-member body. Initially, only the Chief Election Commissioner was appointed. The Commission was later expanded into a multi-member body in 1989 to manage the increasing complexity of elections.

Constituent Assembly Debates on Article 324:

Article 324 vests the "superintendence, direction, and control" of elections in the ECI. The Constituent Assembly recognized the importance of insulating the Commission from executive influence.

- K.M. Munshi argued that if elections were left to the executive, democracy would lose all credibility.
- Dr. B.R. Ambedkar insisted that the Commission must be independent of the government because the government itself would be subject to elections.

This deliberate constitutional design underlines the foundational independence of the ECI.

The 1991 Act and Service Condition Parity:

The Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991 provided that the CEC and ECs would have salaries and conditions of

service equivalent to Judges of the Supreme Court. This was not just about pay but about constitutional stature. The equivalence signaled that Commissioners were on par with other constitutional guardians.

Judicial Recognition of Independence:

In *T.N. Seshan v. Union of India* (1995), the Supreme Court reinforced that the Commission was a constitutional body, not subordinate to the executive. The Court highlighted that its independence was crucial for free and fair elections.

The Anoop Baranwal Case (2023):

Most recently, in *Anoop Baranwal v. Union of India* (2023), the Supreme Court directed that the Chief Justice of India be included in the selection panel for Commissioners until Parliament enacted a law. The Court reasoned that judicial involvement was necessary to check executive dominance.

Key Features of the CEC Bill, 2023

1. Appointment Committee:

- Bill's Composition: Prime Minister, nominated Cabinet Minister, and Leader of Opposition in the Lok Sabha.
- Key Change: Exclusion of the Chief Justice of India.
- Effect: The executive enjoys a 2:1 majority, raising concerns of dominance and bias.

2. Service Conditions:

- Earlier (1991 Act): Equivalent to Supreme Court Judges
- Now (2023 Bill): Equivalent to the Cabinet Secretary
- Effect: Symbolic and practical downgrade of status, aligning Commissioners with bureaucrats rather than constitutional guardians.

3. Tenure:

- Six years or until the age of 65, whichever is earlier (unchanged).

4. Removal Process:

- The CEC can only be removed like a Supreme Court Judge (through impeachment).
- ECs can be removed on the recommendation of the CEC.

5. Government's Justification:

- Parliament is empowered by Article 324(2) to regulate appointments.
- The Supreme Court itself in Anoop Baranwal called judicial inclusion an interim measure.
- Cabinet Secretary equivalence still ensures high status.

Analysis under the Basic Structure Doctrine

Free and Fair Elections as Basic Structure:

In *Indira Gandhi v. Raj Narain* (1975), the Supreme Court held that free and fair elections are part of the basic structure of the Constitution. If elections are compromised, democracy itself collapses.

Independence of the Election Commission:

The ECI's independence is not an optional feature but a constitutional guarantee. In *T.N. Seshan* (1995), the Court recognized that the Commission must remain free of executive control. The CEC Bill, by granting the executive dominance in appointments, risks undermining this guarantee.

The "Referee Problem":

The government, being a contestant in elections, cannot have decisive control over the appointment of the referee. Even the perception of bias damages public trust.

Service Condition Downgrade:

The downgrade from Supreme Court Judge to Cabinet Secretary is a symbolic erosion of independence. Symbols matter in constitutional law because they shape how institutions are perceived and respected.

Removal of Judicial Oversight:

By excluding the CJI, the Bill removes an institutional safeguard. Judicial oversight is a check against executive overreach, consistent with the doctrine of separation of powers.

Judicial Overview

1. Kesavananda Bharati v. State of Kerala (1973): Laid down the basic structure doctrine. Parliament's powers are not unlimited.
2. Indira Nehru Gandhi v. Raj Narain (1975): Free and fair elections are part of the basic structure.
3. T.N. Seshan v. Union of India (1995): Independence of the ECI emphasized.
4. Union of India v. Association for Democratic Reforms (2002): Voters' right to information is part of free and fair elections.
5. People's Union for Civil Liberties v. Union of India (2003): Electoral transparency is vital.
6. Anoop Baranwal v. Union of India (2023): Judicial inclusion in appointments was necessary to maintain independence.

Comparative Perspective

NJAC Case (2015):

The NJAC included the Law Minister and two "eminent persons" in judicial appointments. The Supreme Court struck it down, holding that judicial independence was part of the basic structure.

Parallel with CEC Bill: Just as judicial independence cannot be compromised by executive involvement, electoral independence cannot be compromised either.

International Models:

- United States: Election bodies are state-controlled, but judicial review ensures checks.
- United Kingdom: The Electoral Commission is independent, with appointments made through a parliamentary committee insulated from government dominance.
- South Africa: The Independent Electoral Commission involves a panel including members of the judiciary in appointments.

Lesson: Democracies worldwide recognize that independence of election bodies is central to legitimacy.

Challenges and Critiques

1. Executive Dominance: Two out of three selectors are from the ruling government.
2. Public Perception: Even if Commissioners act fairly, appointments by the government create suspicion.
3. Downgrade in Status: Equating Commissioners with bureaucrats weakens their constitutional authority.
4. Government's Defense: Parliament has explicit power under Article 324(2), but this power is limited by the basic structure doctrine.

Policy Recommendations

1. Restore Judicial Role: Include the CJI in the appointment panel to ensure balance.
2. Maintain Service Parity: Retain equivalence with Supreme Court Judges to preserve stature.
3. Transparency: Appointment processes must be transparent, with reasons recorded.
4. Independent Oversight: Consider parliamentary or judicial oversight to prevent executive capture.

Conclusion

The CEC Bill, 2023 poses a serious constitutional challenge. While Parliament has the authority to legislate on appointments under Article 324(2), this power cannot be exercised in a manner that undermines the basic structure of the Constitution. By granting executive dominance in appointments and downgrading the institutional stature of Commissioners, the Bill threatens the independence of the Election Commission and the principle of free and fair elections.

The NJAC judgment demonstrates that the Supreme Court will not allow executive interference in institutions meant to act as neutral referees. Just as judicial independence was protected, electoral independence must also be preserved.

Ultimately, democracy depends not only on holding elections but on ensuring that those elections are genuinely free, fair, and impartial. The Election Commission is the referee of India's democracy. If the referee is controlled by one of the players, the entire game is rigged.

The CEC Bill, 2023, must therefore be scrutinized carefully to safeguard the integrity of Indian democracy.

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