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a professional
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Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.

Dr. Rinu Saraswat



Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

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E.MBA, LL.M, Ph.D, PGDSAPM

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More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided 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

CHANGING NORMS OF APPOINTMENT TO THE OFFICE OF ELECTION COMMISSION OF INDIA **– EVOLUTION OF ELECTIONS AND THE OFFICE OF ECI**

AUTHORED BY - HARIHAR JAGANNATH

1ST SEMESTER LL.M

GOVT. LAW COLLEGE, ERNAKULAM

If pages are turned back to the history, to the ancient times, we may find that concept of election was not *alien* to us Indians. Right from Vedic Age, although it was a tribal administration and confederacy system references could be found in connection to republics and democracies¹. Further ahead when the *Mahajanapads*² emerged, there are evidences that some among them were following democratic polity. It may be true that only the ruling community had the privilege of voting rights but Election was nonetheless, a norm. Also in Buddhist sects, there were faint traces of elections. So, it can be safely assumed that Britishers were not the first one to bring around and introduce the idea of election, Indian political scenario had already witnessed it much earlier.

Again, during the pre-Independence times, foreign entities and other regional rulers dominated over the inhabitants of India. There were draconian systems in existence, with which people were subjugated under their reign. Because of the regional divide among the provincial rulers, the ones who came in for trade and commerce as “traders” [English] saw an opportunity to make India one of their colonies; and became the next pan-Indian rulers for almost two Centuries straight after eliminating the regional threats and other foreign counterparts. In the course of their rule, they framed many rules for administration.

The Councils Act, 1861 and 1892 were the first document which discussed about Indian participation in Legislative Councils, which formed the provincial governments also assisted and advised the Viceroy, in certain matters upon which the powers were conferred. In Councils Act 1862, Indian participation was ensured strictly through appointments by British officials only. The

¹ How India Votes: History of Elections in Ancient India V.S. Rama Devi & S.K Mendiratta available at <https://www.sahapedia.org/how-india-votes-history-elections-ancient-india>

² R.S. Sharma, *India's Ancient Past* 145 (Oxford University Press, New Delhi, Special Edition, 2019)

idea of election was conveniently overlooked, as English could then exploit their arbitrary position and appoint ones who favoured them.

The situation showed signs of improvement in Councils Act 1892, due to the persistent demands of people of India, even though Indian representation were not granted, there was enhancement in power, now they could raise questions in the annual financial statements but could not ask supplemental questions. Also, they could not vote upon the matter. The strength was increased from 12 to 16 in central legislative councils³.

Then came the Councils Act of 1909, which is also known to be the Morley Minto Reforms. Some major improvements, with respect to Indians, were brought in. Indian representation was now granted. But the elected members were not elected directly. Indians would elect an election college which would in turn elect the representatives. So, the non-elected members were in majority. The strength of the councils was raised from 16 to 60. Also, the concept of separate electorates on the grounds of community was also brought forth.

Later with the Government of India Act 1919, almost 70% of the participation was given to the Indians. Electoral rights were also conferred on Indians. However, whole population were not given the voting rights that is no universal adult franchise. Only people from certain walks of life were allowed to vote, like persons having qualification of higher education, ownership of landed property or having taxable income, previous experience in legislative councils etc. Not to mention the fact that women were strictly excluded. Nevertheless, it was the first time ever, concept of election and voting were made over to a larger voting population as far as India is concerned⁴.

Years went by, India witnessed revolts, mass movements and freedom struggles and finally it was at the juncture of attaining independence. The constituent assembly keeping all these practices in mind drafted the most comprehensive constitution in line with Government of India Act 1935 and other foreign constitutions and sources; with at most care and ambition so that the generations to come, shall not suffer from the wrath of any such external entity and protect the rights and dignity of people of India.

After examining the Constituent Assembly debates, we'll understand the fact that the assembly was ready to adopt right to vote; along with it, periodic and free elections and an independent

³ Bipin Chandra *History of Modern India* (Orient Blackswan Pvt. Ltd, 2021)

⁴ Ibid

authority under union law to preside over and do supervision over elections. Initially they were of the opinion that these provisions shall be included under Part III of the constitution. But then, ultimately with deliberations, constituent assembly reached at a consensus that it shall be made a constitutional right, but nothing less. It was so done because addition to Part III would inevitably make the fundamental rights lengthy, and on the other hand, the election and related aspects has such prominence that it should be documented within the text of Constitution. Hence in the final draft, we find Elections in Part XV under articles 324-329 of the Constitution of India.

The Election Commission of India (ECI) is a constitutional body which administers the conduct of free and fair elections to the Union and State elections. It conducts the election for President, Vice-President, Lok Sabha, Rajya Sabha and state legislatures in the country⁵. The body, constitutes of a Chief Election Commissioner (CEC) at the helm and two Election Commissioners (ECs) to assist and carry out the functions of the CEC.

But then, we are faced with an anomaly. With respect to **Article 324(2)**. How does it read? *The Election Commission shall consist of Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time-to-time fix and appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by the Parliament, be made by the President*⁶. Where does the problem lie? Clearly, it has a subjective clause, which prescribes that the appointments made by the President shall be as per the law passed by the Parliament. 75 years has passed since Independence, yet no law has been passed to that effect. So, we know that this creates a vacuum. A vacant space for law, which should prescribe the appointment procedures and such other things from which the Election Commission of India will derive its power and legal backing. And for the very reason the same was being challenged in court of law in many instances, particularly in the case of **Anoop Barnawal v Union of India**⁷. Constitution prescribes that the President shall appoint, but in reality, is that what's happening? Constitution in **Article 74** says that *there shall be a Council of Ministers with Prime Minister at the head to aid and advise the president, who shall, in exercise of his functions, act in accordance with such advice*⁸. So, it's not the personal preference of the president rather it's the collective opinion of the executive. Ultimately, it can be understood that it is the executive arm of the Government which is making the appointments to

⁵ The Election Commission of India, available at <https://eci.gov.in/about/about-eci/>

⁶ The Constitution of India art. 324(2)

⁷ W.P.(Civil) No. 104 of 2015

⁸ The Constitution of India art. 74

the office of Election Commission of India.

Why is this an issue? That's because, it'll tamper the sanctity of the institution. Why it is said to tamper sanctity? To get the better perspective we must ask certain questions. Who is the executive? It is the ministers who form the executive. How do they become ministers? Through election, people cast their vote to their preferred candidate, and if he manages to obtain major share of the votes pooled, shall become the Member of Parliament. Then the party which has obtained a required number of seats are qualified to form a government or the executive. The leader of the largest party or the person who is accepted by many shall become the Prime Minister. The rest of the ministers/ portfolio are handed over on the recommendation of the Prime Minister and President shall appoint him/her as a minister regarding the concerned portfolio. And who are these election commissioners? They are senior officials of Civil services or the permanent executive. These officials may have had close ties with these Ministers, because they work together or must have worked together. So, naturally the question arises, who will the ministers appoint? Ministers may show a tendency to lean towards the officials who are favourable to them, with a hope that these offices could be influenced. In such a case, is there a chance of bias free conduct of elections and maintenance of decorum? Could be, but there is an equal possibility of an underhand influence, which cannot be overlooked. Also, it is essential to understand the fact that, by favouring one such candidate, the opportunity of a diligent and efficient official is also being denied. The whole system is already being tampered by the executive. It gives rise to grave misconducts in the sphere of public life as, it may allow unqualified person to enter into the field of politics and administration increasing criminality and maladministration. Silence or inaction of the Commission to these instances are nothing but the loyalty towards the appointing authority. This can be averted by reducing favouritism, which in turn can be reduced to a large extent, if the appointment is done by a panel or a collegium.

On the other hand, if the official is someone who does not flex to the needs of executive, he will be dealt with accordingly. Since there is an absence of legislation which recommends a committee for the appointment to the offices of EC and CECs, appointments are currently being done solely by the executive. And it is important to imbibe the fact that only the Office of Election Commission of India and National Board of Scheduled Casts and Scheduled Tribes are the only two Constitutional bodies which doesn't specify the qualification or eligibility in appointments either in the constitution or in any specified legislation. And executive or the government handles all the funds, revenue and budget allocations. So, the executive is currently exploiting the weaker structure of ECI, as the removal of ECs can be done easily. They are always at a threat that their

salaries are not placed within the safeguard of Expenditure charged on the Consolidated Fund of India. Thus, making the office vulnerable to the influences. It is a fact that office to the Election Commission of India is a quasi-judicial body and it must act independently. Just like the Judiciary, it should enjoy fearless independence. It should not be influenced by the whims and fancies of the Government of the day. To make sure that it works independently, the selection process must be made free from the clutches of the executive. This can only be achieved if a proper legislation is brought to that effect.

This is the precise reason why **Dinesh Goswami Report** in 1990 has recommended a selection committee for appointing the CEC and ECs, which constitutes of Prime Minister, Leader of Opposition and Chief Justice of India. As we can clearly see this is an inclusive committee, having representation from all the three organs of the Government. This would have ensured an impartial and bias free appointment to the office of ECI. Not only that, some important recommendations like salaries and other expenses to be charged on Consolidated Fund of India, to establish an independent secretariat etc. Even a bill corresponding to the same was passed in Lok Sabha but it got lapsed.

The 70th Amendment Bill⁹ was tabled, in congruence with aforementioned report, in the Parliament in 1990. But the lack of political will and changes made to the office of ECI, had the bill withdrawn in 1993 with a promise to introduce an enhanced bill. Unfortunately, till date no such bill is passed.

The fact that government has made legislation in connection with Article 324(5) vis-à-vis the conditions of service and conduct of business of ECI cannot be overlooked. **Election Commission (Conditions of Service of Election Commissioners and Terms of Business) Act 1991**. Parliament has conveniently kept silent on the legislation which was to be prepared as per Article 324(2) specifying the appointment procedures, qualifications, removal from the office etc.

Even Representation of People Act, 1951 doesn't deal with the appointment of election commissioners. It only deals with the powers available on Election Commission which is dealt with in **Section 146 of the RPA, 1951**. Parliament could have at least opted to introduce the necessary provisions through an amendment, but have failed. A legislation to that aspect, would have made a statutory backing of the appointment and consequently would have cleared the ambiguity regarding the appointments made to the office.

⁹ The Constitution (70th Amendment) Bill, 1990

Another interesting fact is that for the first four decades of independence, i.e., during the period of 1950-1989, the Election Commission of India was a single membered body which is to say it only had Chief Election Commissioner. With the **61st amendment act, 1989**¹⁰, the voting age of the voters was lowered from 21 yrs to 18 yrs. Consequently, there was a huge influx of new voters to the Electoral roll. To address this workload, two more Election Commissioners were allotted to assist the CEC with a notification of the President in October 1989. Consequently, Shri S.S Dhanoa was appointed as Election Commissioner. They were given status. Again in 1990, with Dhanoa's case single membered status of the Election Commission was upheld by the apex court. This decision was over-turned in T.N. Sheshan's case finally giving recognition to Election Commission consisting of Chief Election Commissioners and Election Commissioners, at a later point of time.

In **S.S Dhanoa v. Union of India and Ors (1990)**¹¹, what happened is that the President issued orders on 7/10/89 and 16/10/89 with regard to the creation of such posts and appointment of Election Commissioners respectively. This was the first instance where such election commissioners were appointed after the independence. Mr. Dhanoa was one among the two such election commissioners. Nonetheless, these orders only lasted less than three months as they were rescinded subsequently. The same was challenged by Mr. Dhanoa approaching the court in a writ petition. He challenged the way in which he was removed from the office. The removal of the Chief Election Commissioners was a complex procedure which falls similar in lines of a Supreme Court Judge. The same was not followed while these Election Commissioners were removed. So somewhere the post of Election Commissioners did not enjoy as much security in tenure as that of Chief Election Commissioner. Not only that, Election Commissioners were differentiated from the CEC in many aspects such as tenure, the salary they draw etc. Court held that the Election commission is a completely independent institution and has to function accordingly. And court was of the opinion that a single person can withhold more political pressure than a multi-membered body. It also specifies that the removal was not within the meaning of second proviso of Article 324(5). So, the termination of services is not open to challenge on the grounds of any illegality. Finally, court upheld the status of Election Commission as a single membered body.

T.N. Sheshan, Chief Election Commissioner of India v. Union of India (1993)¹², again the question of existence of Election Commissioners were drawn in during 1993. The court looked

¹⁰ The Constitution (61st Amendment) Act 1989

¹¹ (1991) 3 SCC 567

¹² (1995) 4 SCC 611

into the constitutional provision of Article 324(2) where it mentions that there shall be a Chief Election Commissioner and other Election commissioners if any as specified by the president. Clearly, constitution, in the provision accounts for the appointment of Election Commissioners at the discretion of president and on recommendation of the CEC. To better comprehend this, the court looks into the constitutional assembly debates and finds that the constitution framers had two options while creating the Election Commission. Either they could appoint a permanent body, who would seldom have any role in the absence of elections. Or they could create an ad-hoc body. But they reached a mid-ground by the reason that Election Commission be manned by a permanent CEC, so that the structural skeleton is always present and further, the ECs could be supplemented with from time to time. This fact was overlooked while giving Dhanoa's judgement. So, it was found that the observations made in Dhanoa's case were incorrect and the same was overruled. Supreme Court upholds that the office to Election commission is a multi-membered body and gives validity to the Election Commissioners.

A comparative analysis with the other Constitutional office- bearers like the President, Vice President, Comptroller and Auditor General, Chief Justice of India, Speaker to the Lok Sabha it could be easily understood that none of those articles have any subjective clause and hence it has finality. As it is discussed earlier, only the office of Election commission holds such an ambiguity in appointment. So, it is high time, to make the vacuum in provision clearly properly levelled and a legislation to that aspect must be brought out.

Second Administrative Reforms Committee headed by Law Minister Veerappa Moily also recommended the formation of a collegium consisting of Prime Minister, Opposition Leader, Speaker to Lok Sabha, Law Minister, deputy chairman of Rajya Sabha to make recommendations to President while appointing the CEC and ECs. It suggested several reforms, again which were similar to those which have been discussed earlier, in 2010.

Even the **255th Law Commission Report (on Electoral reforms) 2015**¹³ recommends the selection committee which would ensure a greater autonomy to ECI. Strengthening of the Office of ECI

- (i) Giving equal protection of all the members in matter of removability
- (ii) Making the appointment of commissioners a consultative process

¹³ Law Commission of India, 255th Report on Electoral Reforms to the Ministry of Law & Justice (March 2015)

- (iii) Independent and permanent secretariat in lines with the Lok Sabha and Rajya Sabha counterparts

These recommendations find importance because, it is imperative to note that the Chief Election Commissioner and other Election Commissioners are differentiated. CEC are having a higher security in their tenure because they can only be removed, similar to a Supreme Court Judge. But no such guarantee is available on the Election Commissioners. They could be removed on the recommendation of CEC. Also, a CEC can hold office up to 65 years of age, similar to a Supreme Court judge whereas an Election Commissioner is able to hold only up to 62 years. Also, the salary of the CEC cannot be varied to his disadvantage but a similar provision is absent in the case of Election Commissioner. In effect, the Election Commissioners are placed at a disadvantage. Hence, there was also a demand to make these posts similarly insulated as the CEC so that they can better discharge their duties without fear of removal or influence from the executive.

Again, reinforcing other points, that the appointment should be done by a collegium so that the power is distributed among different wings of the government. Independent secretariat means that the office staff would also be free from any sort of influence from the executive. That is to say, if their salaries are paid as expenditure charged on the Consolidated Fund of India, they cannot be financially strangled or starved by the executive and thus cannot bring them on their knees to bow before the executive. Ultimately, these secretariat staff can also discharge their duties effectively if they are also insulated from the direct purview of the executive. These are the basic areas where profound changes are to be brought in.

Also, there was a contention that there is a violation of Article 14 of the Indian Constitution in several cases. Rule of law is the basic theoretical backbone for a democratic society. Democracy is when, a citizen is given a right to choose the representative, which he could exercise in a manner which he pleases. Free and fair elections are the key to democracy. Election commission is entrusted with the most basic yet most important role of conduct of free and fair elections. They are the watchdogs. What if the commission treats political parties unevenly, which is to say, giving some unethical upper-hand or favoritism to the ruling party and letting the other party suffer? There is the breakdown of the norm of free and fair elections. There is break of Article 14. And finally, it infringes the common man's right of choice which is enclosed in Article 19(1)(a). Ultimately, the democracy fails. This, also should be addressed.

Ultimately, in the final verdict of *Anup Barnawal v. Union of India*¹⁴, the Supreme Court acts up to the need of the hour and after considering the material facts and provisions finds that there is in reality a vacuum of a legislation which would empower the body of Election Commission of India. Due to the legislative inertia, SC acting upon the petitions, had to push the Government into the track and asks to formulate such necessary law which would fit the requirement. The appointment procedure followed would be as per the recommendations of several committees that is, new system of collegium comprising of Prime Minister, Leader of Opposition or in absence of such opposition leader; the leader of the single largest party in the opposition and the Chief Justice of India with immediate effect until such a law is being passed. Regarding the permanent & independent Secretariat and expenses to be charged on the Consolidated Fund, the court has also recommended the Union Government to make necessary requirements to make the body truly independent.

Where does this judgement leave us? The long-standing legal tussle has finally arrived at a positive juncture. In perspective of the framers of the Constitution, this was something which was to be achieved at a much earlier point of time. They had left a subjective clause purposefully to the future parliamentarians for two reasons. Primarily, they had other matters at hand which required dire attention. Secondly, the discretion was bestowed upon the upcoming parliamentarians so that they get time to decide upon and legislate a suitable law which was required then. We still call India the largest democracy, but what is democracy if the will of the person is not transcended into the political realm in the first place? What is the use of being a democratic nation for the name-sake if all the threads are being pulled by the political parties coming into power using unethical measures by influencing such offices. Election Commission of India, is no doubt a pristine body which is to safeguard democracy. And in striving to that objective, it's functioning should not be suffering from interference in any manner which tampers the autonomy. The latest judgement will definitely free the Election Commission from the clutches of the executive, by strengthening it with a legislation in the due course and making it autonomous in true sense. Hence, it would envisage the citizens voting rights and country's democracy to a much higher and meaningful level.

¹⁴ Supra note 7