

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION
WRIT PETITION(CIVIL) NO(S). 104 OF 2015**

ANOOP BARANWAL

...PETITIONER(S)

VERSUS

UNION OF INDIA

...RESPONDENT(S)

WITH

WRIT PETITION(CIVIL) NO(S). 1043 OF 2017

WRIT PETITION(CIVIL) NO(S). 569 OF 2021

WRIT PETITION(CIVIL) NO(S). 998 OF 2022

J U D G M E N T

RASTOGI, J.

1. I have had the advantage of going through the judgment penned by my brother K.M. Joseph, J. I entirely agree with the conclusions which my erudite Brother has drawn, based on the remarkable process of reasoning with my additional conclusion. I wish to add few

lines and express my views not because the judgment requires any further elaboration but looking for the question of law that emerge of considerable importance.

2. For the purpose of analysis, the judgment has been divided into following sections:

- I. Reference**
- II. Election Commission of India**
- III. Why an independent Election Commission is necessary**
 - A. Working a Democratic Constitution**
 - B. Right to vote**
 - C. Free and fair elections**
- IV. Constitutional and statutory framework: The Constitutional Vacuum**
- V. The Judgment in TN Seshan**
- VI. Reports of various Commissions on Manner of Appointment of Chief Election Commissioner and Election Commissioners**
- VII. Comparative framework - Foundational parameters**
- VIII. Process of selection of other constitutional/statutory bodies**
- IX. Constitutional silence and vacuum- power of the Court to lay down guidelines**
- X. Independence of Election Commissioners**
- XI. Directions**

I. Reference

3. This case arises out of a batch of writ petitions, with the initial petition filed as a public interest litigation by Anoop Baranwal in January 2015. The petitioner raised the issue of the constitutional validity of the practice of the Union of India to appoint the members of the Election Commission. It was argued in the petition that a fair, just, and transparent method to select the members of the Election Commission is missing. The petition also referred to several reports, which we will discuss in due course, to highlight the issue of bringing reforms in the selection of members of the Election Commission. It was further highlighted that since the appointment of the members of the Election Commission was solely on the advice of the parliamentary executive of the Union, which leads to arbitrariness and is in violation of Article 14 of the Constitution. The petition has also suggested that the process of selection of members of the Election Commission (Chief Election Commissioner/Election Commissioner) should be transparent and with greater scrutiny, accountability and stability as it is for the other constitutional and legal authorities including Judges of the Supreme Court and High

Courts, Chief Information Commissioner, Chairpersons and Members of the Human Rights Commission, Chief Vigilance Commissioner, Director of Central Bureau of Investigation, Lokpal, Members of the Press Council of India. The writ petition made a prayer for issuing of mandamus to the Union Government to make law for ensuring a transparent process of selection by constituting a neutral and independent committee to recommend the names of Chief Election Commissioner/Election Commissioners. Vide order dated 23 October, 2018, a two Judge Bench of this Court emphasized on the importance of the matter, and referred the matter under Article 145(3) of the Constitution to the Constitutional Bench. The order is reproduced as follows:

“The matter relates to what the petitioner perceives to be a requirement of having a full-proof and better system of appointment of members of the Election Commission.

Having heard the learned counsel for the petitioner and the learned Attorney General for India we are of the view that the matter may require a close look and interpretation of the provisions of Article 324 of the Constitution of India. The issue has not been debated and answered by this Court earlier. Article 145 (3) of the Constitution of India would, therefore, require the Court to refer the matter to a Constitution Bench. We, accordingly, refer the question arising in the present proceedings to a Constitution Bench for an authoritative pronouncement. Post the matter before the Hon’ble the Chief Justice of India on the Administrative Side for fixing a date of hearing.”

4. A couple of similar writ petitions were tagged with the above petition. On 29 September 2022, this Constitution Bench started the hearing of the case. The Bench sat for several days hearing the arguments of the petitioner side and of the Union government and Election Commission of India on the respondents' side.

5. The Union Government has opposed this group of petitions on the premise that the Court must respect the principle of separation of power between different organs of the State and should refrain from interfering in the selection process of the Election Commission under Article 324. It was argued by the Union that Article 324 of the Constitution conferred the power to appoint Election Commissioners solely upon the Parliament. He made a reference to the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991 (hereinafter being referred to as the "Act 1991") to emphasize his point that the Parliament being cautious of its responsibility protected the condition of service of the Chief Election Commissioner/Election Commissioners.

6. The learned Attorney General Mr. R. Venkataramani suggested that the absence of any law does not mean that a constitutional vacuum exists, calling for the interference of the Court. It was also

argued by the learned Attorney General that the appointment of the members of the Election Commission by the President has not damaged the process of free and fair elections.

7. The learned Solicitor General Mr. Tushar Mehta argued that if there are lacunas in the process of selection/appointment of Election Commission, then it is for the Parliament and not the Court to look into the issues. The learned counsel further argued that the appointment of the Election Commissioners is to be made by the President, therefore it is not open to the judiciary to interfere with the power of the executive. Mr. Mehta further argued that there is something called “independence of the executive” which must not be interfered with. It was also argued by the counsel for the Election Commission that since the right to vote is a statutory right and not a fundamental right, so it does not call any interference for violation of fundamental rights.

8. It was raised by the petitioners that the issue of appointment of Election Commission is linked not just with the right to vote but with the conception of free and fair elections. Reference was also made to the selection processes in other jurisdictions to emphasize on the point that a larger set of parameters or factors play an important role

in appointment of Commissioners. Points were also debated regarding the term of the Chief Election Commissioner/Election Commissioners, and the process of removal of Election Commissioners. The petitioners further argued that there must be constitutional safeguards in the term and tenure of the Election Commissioners, so that they can function independently.

9. This case not only raises certain fundamental questions about the interpretation of Article 324 of the Constitution but also forces us to look at the larger perspective about how the process of selection of Election Commission is linked with the working of a democracy, the right to vote, idea of free and fair elections, and the importance of a neutral and accountable body to monitor elections. This Court ought to make a discussion on these interconnected debatable issues raised for our consideration. All these points are indeed sacrosanct for democracy and for maintaining the independence of the Election Commission.

II. Election Commission of India

10. Article 324 (1) provides that the power of superintendence, direction, and control of the preparation of the electoral rolls for, and the conduct of, elections to Parliament and to the Legislature of every

State and of elections to the offices of President and Vice-President held under the Constitution is vested in the Election Commission.

11. As to the composition of the Election Commission, Article 324(2) provides that the Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix, and the appointment of the Chief Election Commissioner and other Election Commissioners, subject to the provisions of any law made in that behalf by the Parliament, be made by the President.

12. By an order dated 1st October 1993, the President has fixed the number of Election Commissioners as two, until further orders. The current composition of the Election Commission is that of Chief Election Commissioner and two Election Commissioners.

13. Article 324(3) provides that the Chief Election Commissioner shall act as the Chairman of the Election Commission.

14. As regards the service conditions, Article 324(5) provides that subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be determined

by the rules made by the President. In exercise of its power under Article 324(5), the Parliament has enacted the Act 1991.

15. The provisos to Article 324(5) provide the mechanism for removal of Chief Election Commissioner, Election Commissioners, and Regional Commissioner. The first proviso to Article 324(5) provides that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment. Furthermore, any other Election Commissioner or a Regional Commissioner, according to the second proviso to Article 324(5), shall not be removed from office except on the recommendation of the Chief Election Commissioner.

16. The facility of support staffs of the Election Commission has been covered under Article 324(6), which provides that the President, or the Governor of a State, shall, when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission.

17. The question that emerges for consideration is what interpretation needs to be afforded to the above-discussed provisions, so that the independence of the Election Commission is ensured. Before dealing with that, we shall deal with the necessity of the independence which is imperative of the Election Commission.

III. Why an independent Election Commission is Necessary

A. “Working a Democratic Constitution”¹

18. The basic perception of democracy is that it is a government by the people, of the people, and for the people. “People” is the central axis on which the concept of democracy revolves. The establishment of democracy has been linked with the idea of welfare of the people. Dr BR Ambedkar had once noted that democracy means “a form and a method of government whereby revolutionary changes in the economic and social life of the people are brought about without bloodshed.”² Democracy is thus linked with the realization of the aspirations of the people.

¹ Borrowed from the title of the classic book - Granville Austin, Working a Democratic Constitution: A History of the Indian Experience, Oxford University Press.

² Babasaheb Ambedkar: Writings and Speeches, Vol. 17 Part III, page 475

19. According to the celebrated philosopher John Dewey, “Democracy is not simply and solely a form of government, but a social and personal ideal”, in other words, it is not only a property of political institutions but of a wide range of social relationships.³ Democracy is thus about collective decision-making. The principles of democracy have been held as a part of the basic structure of the Constitution.⁴

20. The Indian Constitution establishes a constitutional democracy. The Preamble to the Constitution clearly lays down the vision and creates an outline of the structure of democracy that India envisaged to be, right at the moment of independence. The Preamble to the Indian Constitution begins with the phrase “We, the People of India”. This clearly indicates that the foundations of the future of the Indian Constitution and democracy begin with the people of India at the core. The phrase also means that the people of India would be in a deciding position to choose the governments they want. The phrase also highlights that the structures of governance which were being created by the Constitution were supposed to act towards the welfare of the people. The Preamble provides that the people of India have

³ <https://plato.stanford.edu/entries/dewey-political/>

⁴ His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Another, (1973) 4 SCC 225

resolved to constitute India into a “SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC”. Each term in this phrase defined the collective vision of not only the founders of the Indian Constitution but also the collective destiny of the people of India. These words also denote the kind of democratic structures that we were going to create. The word “DEMOCRATIC” in the Preamble is interlinked with the words preceding and succeeding it, that is “SOVEREIGN”, “SOCIALIST”, “SECULAR”, “REPUBLIC”. The Preamble also provides that the people of India are securing for its citizens “JUSTICE social, economic and political”. The word “JUSTICE” manifests the vision of undoing hundreds of years of injustice that was prevalent on Indian soil. Justice was to be based on three components: social, economic, and political.

21. Democracy was established in India to fulfill the goals which have been significantly encapsulated in the terms of the Preamble. The institutions which were set up were given a role and duty to fulfill the task as enshrined in the Preamble and the Constitution. While the three main pillars of the State rest on the legislature, executive, and judiciary have their designated roles, the Constitution framers were also visionary in the sense that they envisaged the creation of

other institutions, which would be independent in nature and would facilitate the working of the three pillars by either demanding accountability or by taking on roles which would maintain the faith of the people in the three pillars of democracy. The Election Commission of India is one such institution that has been created through the text of the Constitution. It is constitutionally an independent body. The role of the Election Commission of India is to ensure that the democratic process in India does not come to a standstill. The task conferred on the Election Commission is enormous. It has to ensure that periodical elections keep on happening.

22. India has chosen a system of direct elections. This means that elections are supposed to happen at regular intervals where the people of India directly participate by exercising their right to vote. The Constitution also provides for elections where the representatives of the people are chosen by an indirect method. These include the elections for the post of President and Vice-President and the members of State Legislative Councils. The task to maintain the sanctity of the elections is supposed to be carried out by the Election Commission in a fair, transparent and impartial manner, and

without any bias or favour. The Election Commission has been given a wide range of powers towards “*superintendence, direction, and control*” over the conduct of all elections to Parliament and the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution. The three words “*superintendence*”, “*direction*”, and “*control*” have not been defined in the Constitution but were used in a sense to give the widest responsibility to the Election Commission. In that sense, the Election Commission becomes one of the most important as well as central institutions for preserving and promoting the democratic process and the structures of democracy on Indian soil. The role of the Election Commission takes much more relevance given the fact that how the Indian society and polity used to traditionally behave. As a chief architect of the constitution, Dr. B.R. Ambedkar once said “Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.”⁵

23. The Election Commission performs its role to ensure that every person in the society is able to participate in the process of elections to select the government. Therefore, the Election Commission in its

⁵ Constituent Assembly Debates, 4 November 1948, <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C04111948.html>

working needs to demonstrate the highest degree of transparency and accountability. The decisions taken by the Election Commission need to generate the trust of the people so that the sanctity of the democratic process is maintained. If the Election Commission starts showing any arbitrary decision-making, then the resulting situation would not just create doubt on the members of the Election Commission of being biased but would create fear in the minds of the common citizens that the democratic process is being compromised. Therefore, the Election Commission needs to be independent and fully insulated from any external or internal disrupting environment. The working of the Commission has to generate confidence in the minds of the people. In a country like India, where millions of people still struggle to fulfill their basic needs, it is their right to vote which gives them hope that they would elect a government that would help them in crossing the boundaries of deprivation. If this power is compromised or taken away even by one slight bad decision or biases of the members of the Election Commission, it would undoubtedly attack the very basic structure of Indian democracy. The Indian democracy has succeeded because of the people's faith and participation in the electoral process as well as the everyday work of the institution. As a constitutional court of the world's largest

democracy, we cannot allow the dilution of people's faith in democratic institutions. The country gained and adopted democracy after decades of struggle and sacrifices, and the gains received by us cannot be given away because the institutions still continue to operate in an opaque manner.

24. A nine-judge bench of this Court in the case of **K.S. Puttaswamy and Another v. Union of India and Others**⁶ held:

“Opacity enures to the benefit of those who monopolize scarce economic resources. On the other hand, conditions where civil and political freedoms flourish ensure that governmental policies are subjected to critique and assessment. It is this scrutiny which subserves the purpose of ensuring that socio-economic benefits actually permeate to the underprivileged for whom they are meant. Conditions of freedom and a vibrant assertion of civil and political rights promote a constant review of the justness of socio-economic programmes and of their effectiveness in addressing deprivation and want. Scrutiny of public affairs is founded upon the existence of freedom.”

25. Indian democracy will work only when the institutions which have the responsibility to preserve democracy work. Each institution in our Constitution has its demarcated role, which can only be fulfilled if the people who are running these institutions are responsible. The people who run these institutions need to be

⁶ (2017) 10 SCC 1

accountable to the people, and therefore the process of selecting them has to ensure the independence of the institution.

26. Democracy is not an abstract phenomenon. It has been given effect by a range of processes. The perception and trust in institutions are important parameters on which the working of democracy is assessed. The success of democracy, thus, depends on the working of institutions that support the pillars of the structure of democracy.

27. Accountability of institutions provides legitimacy not only to the institutions themselves, but also to the very idea of democracy. That is to say, if the institutions are working in a fair and transparent manner, then the citizens would be assured that democracy is working. In that sense, democracy is a means to check on officeholders and administrators and to call them to account. Therefore, the norms and rules governing these institutions cannot be arbitrary or lack transparency.

28. To strengthen the democratic processes, the institution of the Election Commission needs to be independent and demonstrate transparency and accountability. This reason is enough in itself to

call this Court to examine the institutional structure of the Election Commission of India.

B. Right to Vote

29. The working of democracy depends on whether the people can decide the fate of the elected form of government. It depends on the choices which people make in different ways. This choice of people cannot be compromised, as their mandate in elections changes the destinies of government. India is democratic because the people govern themselves. It is a republic because the government's power is derived from its people. Through the electoral process and voting, citizens participate in democracy. By voting, citizens take part in the public affairs of the country. Thus, citizens by voting enjoy their right to choose the composition of their government. It is their choice, and their ability to participate. A nine-judge bench in the case of **K.S.**

Puttaswamy (Supra) held:

“... it must be realised that it is the right to question, the right to scrutinize and the right to dissent which enables an informed citizenry to scrutinize the actions of government. Those who are governed are entitled to question those who govern, about the discharge of their constitutional duties including in the provision of socio-economic welfare benefits. The power to scrutinize and to reason enables the citizens of a democratic polity to make informed decisions on basic issues which govern their rights.”

30. The right to vote is now widely recognized as a fundamental human right.⁷ However, this was not always the case. The history of the adult franchise tells us that it was limited to the privileged in society.⁸ It took several decades of struggles by marginalized communities to gain the right to vote. The right to vote is so intrinsic to the practice of democracy.

31. It has been argued by the counsel for the Election Commission of India, that the right to vote is merely a statutory right, and since no fundamental right is violated, it does not call the attention of this Court. This Court does not agree with the view argued by the Election Commission. Furthermore, it becomes necessary to look at the Constituent Assembly Debates to examine the scope of the right to vote.

32. The demand for the adult franchise was consistently raised by several Indian leaders. In their drafts prepared for the consideration of the Constituent Assembly, Dr. BR Ambedkar⁹ and KT Shah¹⁰ had

⁷ <https://www.ohchr.org/en/elections>

⁸ BR Ambedkar, "Evidence before the Southborough Committee", in Babasaheb Ambedkar: Writings and Speeches, published by Government of India, Vol. 1, pages 243-278

⁹ BR Ambedkar, "States & Minorities", in Babasaheb Ambedkar: Writings and Speeches, published by Government of India, Vol. 1., pages 381-541

¹⁰ B. Shiva Rao, The Framing of India's Constitution, Select Documents, Vol. 2, at Page 54 (hereinafter "Shiva Rao")

proposed the incorporation of the right to vote in the fundamental rights portion. This proposal was initially endorsed in the initial draft report of the Fundamental Rights Sub-Committee, which was a part of the Advisory Committee of the Constituent Assembly.¹¹ The draft provision also included a sub-clause on an independent Election Commission. Reproduced as follows:

1. "Every citizen not below 21 years of age shall have the right to vote at any election to the Legislature of the Union and any unit thereof, or, where the Legislature is bicameral, to the lower chamber of the Legislature, subject to such disqualifications on the ground of mental incapacity, corrupt practice or crime as may be imposed, and subject to such qualifications relating to residence within the appropriate constituency, as may be required by or under the law.
2. The law shall provide for free and secret voting and for periodical elections to the Legislature.
3. The superintendence, direction and control of all elections to the Legislature whether of the Union or the unit, including the appointment of Election Tribunals shall be vested in an Election Commission for the Union or the unit, as the case may be, appointed in all cases, in accordance with the law of the Union."

33. This shows that the Framers envisaged that the right to vote must be accompanied by a provision establishing the Election Commission. Constitutional Adviser B.N. Rau's note on the draft provision explains the inclusion of the right to vote as a fundamental right: "*Clause 12. This secures that the right to vote is not refused to*

¹¹ Shiva Rao, at pages 137 & 139 (dated 03.04.1947)

*any citizen who satisfies certain conditions. The idea of an Election Commission to supervise, direct and control all elections is new.*¹²

34. KT Shah however objected to the idea of a centralized Election Commission. He argued that, “if adopted, would be a serious infringement of the rights of Provincial Autonomy; and as such, I think it ought to be either dropped or reworded, so as not to prejudice the rights of the Provincial Legislature to legislate on such subjects.”¹³ The clause on right to vote and the creation of the Election Commission as part of the fundamental rights was then accepted by a majority vote by the Fundamental Rights Sub-Committee.¹⁴ The clause was then forwarded to the Advisory Committee in the “Report of the Sub-Committee on Fundamental Rights” dated April 16, 1947.¹⁵

35. The draft prepared by the Fundamental Rights Sub-Committee was examined by the Minorities Sub-Committee to see if any rights proposed needed to be “amplified or amended” to protect minority rights.¹⁶ In the Minutes of the Meeting of the Minorities Sub-

¹² Shiva Rao, page 148

¹³ *ibid*, page 155

¹⁴ *Ibid*, page 164

¹⁵ *Ibid*, p. 173. Furthermore, the ground for contrary views was only that the right was being extended the States/units. See “Minutes Of Dissent To The Report” dated April 17-20, 1947 by KM Panikkar, page 187

¹⁶ *ibid*, page 199

Committee dated April 17, 1947, there were two suggestions on the fundamental right to vote and Election Commission. S.P. Mukherjee proposed, *“Minorities should be adequately represented on the Election Commissions proposed for the Union and the units”*.¹⁷ Jairamdas Daulatram suggested that “such bodies should be made neutral so that they may inspire confidence among all parties and communities. Separate representation for the minorities may not be workable.”¹⁸ It was also decided by the Minorities Sub-Committee on April 18, 1947 “to mention in [their] report that the Election Commission should be an independent quasi-judicial body.”¹⁹

36. After the clause on the right to vote passed by the Fundamental Rights Sub-Committee and the Minorities Sub-Committee reached for consideration before the Advisory Committee, there was a serious debate on whether to keep the clause in the fundamental rights chapter or not. Dr. Ambedkar argued for retaining it as a fundamental right.²⁰ He stated:

“... so far as this committee is concerned my point is that we should support the proposition that the committee is in favour of adult suffrage. The second thing we have guaranteed in this fundamental right is that the elections shall be free and the elections shall be by

¹⁷ *ibid*, page 201

¹⁸ *ibid*, page 201

¹⁹ *ibid*, page 205

²⁰ *ibid*, page 247

secret voting. It shall be by periodical elections... The third proposition which this fundamental clause enunciates is that in order that elections may be free in the real sense of the word, they shall be taken out of the hands of the Government of the day, and that they should be conducted by an independent body which we may here call an Election Commission.”²¹

37. But this view was disagreed with by several members of the Advisory Committee. They had an apprehension that such a clause may be objected to in the Constituent Assembly by the representatives of the Princely States.²² C. Rajagopalachari expressed that the future method of elections was not clear, and hence it was not right to keep a detailed clause on the franchise in the fundamental rights. He said:

“My only point is whether it is proper to deal with this as a fundamental right or whether we should leave it, or a greater part of it, for the consideration of the whole Assembly. I submit we cannot take it for granted that the Union Legislature shall be elected by the direct vote from all citizens from all India. It may be a Federation Constitution. It may be indirectly elected. The Government of the Union may be formed indirectly, so that we cannot assume that every adult or any one whatever the description may be, shall have a direct vote to the Legislature. We cannot lay down a proposition here without going into those details. We cannot therefore deal with the subject at all now. Whether there is going to be direct election or indirect election, that must be settled first.”²³ (sic)

38. Dr. Ambedkar tried to resolve the opposition to this clause by arguing that:

²¹ *ibid*, page 249-250

²² Statement of Sardar Patel, p. 249

²³ *ibid*, page 250

“My reply is that this document or report will go before the Constituent Assembly. There will be representatives of the States; there will be representatives of the Muslim League. We shall hear from them what objection they have to adult suffrage. If the whole Constituent Assembly is convinced that while it may be advisable to have adult suffrage for British India, for reasons of some special character, the Indian States cannot have adult suffrage, and there must be some sort of a restricted suffrage, it will be still open to the Constituent Assembly to modify our proposals.”²⁴

39. Govind Ballabh Pant explained the reason why there was a concern regarding inclusion of the right to vote in the fundamental rights chapter. He said:

“The only apprehension is that some people belonging to the States may prick the bubble and say that their rights have been interfered with and so on. They may not be represented. We will have what we desire.”²⁵

40. In response to Pant, the following reply was given by Dr Ambedkar:

“While we are anxious that the Indian States should come in, we shall certainly stick to certain principles and not yield simply to gather the whole lot of them in our Constitution.”²⁶

41. As an alternative, Govind Ballabh Pant suggested that “this very clause is sent to the Constituent Assembly, not as part of these fundamental rights, but included in the letter of the Chairman to the

²⁴ *ibid*, page 250

²⁵ 251

²⁶ *ibid*, page 251

effect that we recommend to the Constituent Assembly the following principles in regard to the framing of the Constitution.”²⁷ While Dr. Ambedkar insisted on his view, the majority of members of the Advisory Committee including Sardar Patel adopted Pant’s suggestion.²⁸

42. Accordingly, in the “Minutes of the Meetings of the Advisory Committee” dated April 21, 1947, it was noted: “Clause 13 to be deleted from the fundamental rights, but it should be recommended by the Chairman in his report to the Constituent Assembly on behalf of the committee, that it be made a part of the Union Constitution.”²⁹

In his letter addressed to the President of the Constituent Assembly, Sardar Patel presented the interim report of the Advisory Committee, while also noting that: “While agreeing in principle with this clause, we recommend that instead of being included in the list of fundamental rights, it should find a place in some other part of the Constitution.”³⁰

²⁷ *ibid*, page 251

²⁸ *ibid*, page 251-52

²⁹ *ibid*, page 288

³⁰ *ibid*, page 296

43. What emerges from this discussion is that there was an initial agreement among the members of the fundamental rights sub-committee and the minority rights sub-committee that there needs to be a clause in the fundamental rights chapter which should provide for the right to vote; and the task to conduct free and fair elections, there shall be an independent body called the Election Commission. However, the clause was not retained by the Advisory Committee as a fundamental right because it was apprehended that the princely states might not agree to the Union Constitution if that clause is retained, as India was going through a historical period of unification where negotiations were being made with the princely states to become part of a united India. Despite this, the Founders retained the right to vote as a constitutional right by recommending that it should find a place in the text of the constitution.

44. On 16 June 1949, Dr. B.R. Ambedkar moved the following clause, providing for the adult franchise:

“289-B: Elections to the House of the People and to the Legislative Assemblies of states to be on the basis of adult suffrage: The elections to the House of the People and to the Legislative Assembly of every State shall be on the basis of adult suffrage; that is to say, every citizen, who is not less than twenty-one years of age on such date as may be fixed in this behalf by or under any law made by the appropriate Legislature and is not otherwise disqualified under this Constitution or any law made by the appropriate Legislature on the ground of nonresidence,

unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.”³¹

45. The clause was adopted, which later became Article 326 of the Constitution.

46. By virtue of Article 326, the right to vote became a constitutional right granted to citizens. The said right was given effect by Section 62 of Representation of the People (ROP) Act, 1951. Section 62(1) of ROP Act provides: “No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency.” The legal position is that the relevant provision of the ROP Act is derived from the text of the Constitution, which in this case, is Article 326.

47. However, the judgments of this Court adopted a restricted view of the right to vote for a number of decades. In **N.P. Ponnuswami v. Returning Officer, Namakkal Constituency and Others**³² (hereinafter “**N.P. Ponnuswami**”), a bench of six judges of this Court was dealing with the question whether the High Court under Article

³¹ CONSTITUENT ASSEMBLY OF INDIA DEBATES (PROCEEDINGS)- VOLUME VIII Thursday, the 16th June 1949, Available at: <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C16061949.html>

³² 1952 SCR 218

226 can have jurisdiction to interfere with the order of the Returning Officer by reason of the provisions of Article 329(b) of the Constitution. While the Court was examining the contours of Article 329(b), it also made the following observation: “The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it.”

48. A different view was adopted by a Constitution Bench of this Court in the case of **Mohindhr Singh Gill and Another v. Chief Election Commissioner, New Delhi and Others.**³³ (hereinafter “Mohindhr Singh Gill”). The Bench was called on to interpret Articles 324 and 329(b) of the Constitution. It noted:

“The most valuable right in a democratic polity is the 'little man's' little pencil-marking, accenting and dissenting, called his vote.... Likewise, the little man's right, in a representative system of Government to rise to Prime Ministership or Presidentship by use of the right to be candidate cannot be wished away by calling it of no civil moment. If civics mean anything to self-governing citizenry, if participatory democracy is not to be scuttled by law.... The straightaway conclusion is that every Indian has a right to elect and be elected and this is constitutional as distinguished from a common law right and is entitled to cognizance by Courts, subject to statutory Regulations.”

³³ (1978) 1 SCC 405

49. However, a subsequent decision of a two-judge bench in **Jyoti Basu and Others v. Debi Ghosal and Others**³⁴ (hereinafter “**Jyoti Basu**”) relied upon the position taken by **N.P. Ponnuswami (Supra)**. The two-judge bench was dealing with the specific question who may be joined as a party to an election petition, but went to observe:

“A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a Common Law Right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute and election. Statutory creations they are, and therefore, subject to statutory limitation.”

50. While the above three decisions made statements of the right to vote, the issue of interpretation of Article 326, dealing with adult franchise, had not arisen in these cases. Therefore, the statements made cannot be treated as an authority on the subject.

51. In the case of **Union of India v. Association for Democratic Reforms and Another**³⁵ (hereinafter “**ADR**”), this Court was considering whether there is a right of the voter to know about the candidates contesting election. Holding in affirmative, it was held:

“In democracy, periodical elections are conducted for having efficient governance for the country and for the benefit of citizens - voters. In a democratic form of government, voters are of utmost importance.

³⁴ (1982) 1 SCC 691

³⁵ (2002) 5 SCC 294

They have right to elect or re- elect on the basis of the antecedents and past performance of the candidate. The voter has the choice of deciding whether holding of educational qualification or holding of property is relevant for electing or re-electing a person to be his representative...”

(emphasis added)

52. Amendments were made to ROP Act after **ADR** judgment.

Whether the amendments followed the mandate laid down in **ADR** were scrutinized by a three-judge bench case of **People’s Union for Civil Liberties (PUCL) and Another v. Union of India and Another**³⁶ (hereinafter “**PUCL 2003**”). This Court re-examined the issue of whether a voter has any fundamental right to know the antecedents/assets of a candidate contesting the election under Article 19(1)(a). An argument was made before this Court that a voter does not have such a right, as there is no fundamental right to vote from which the right to know the antecedents of a candidate arises. While the three judges (M.B. Shah, Venkatarama Reddi, D.M. Dharmadhikari, JJ.) unanimously agreed that the voters have a right under Article 19(1)(a) to know the antecedents of a candidate, there was a difference on whether the scope of the right to vote.

53. Referring to **N.P. Ponnuswami** and **Jyoti Basu** judgments, Justice MB Shah held that “there cannot be any dispute that the

³⁶ (2003) 4 SCC 399

right to vote or stand as a candidate for election and decision with regard to violation of election law is not a civil right but is a creature of statute or special law and would be subject to the limitations envisaged therein.” He held that, “Merely because a citizen is a voter or has a right to elect his representative as per the [ROP] Act, his fundamental rights could not be abridged, controlled or restricted by statutory provisions except as permissible under the Constitution.” He stated that whether the right to vote is a statutory right or not does not have any implication on the right to know antecedents, which is a part of fundamental right under Article 19(1)(a). He however also held that democracy based on adult franchise is part of the basic structure of the Constitution, and that the right of adults to take part in the election process either as a voter or a candidate could only be restricted by a valid law which does not offend constitutional provisions.

54. Justice Venkatarama Reddi emphasized on the right to vote, and held:

“The right to vote for the candidate of one's choice is of the essence of democratic polity. This right is recognized by our Constitution and it is given effect to in specific form by the Representation of the People Act. The Constituent Assembly debates reveal that the idea to treat the voting right as a fundamental right was dropped;

nevertheless, it was decided to provide for it elsewhere in the Constitution. This move found its expression in Article 326..."

55. He disagreed with the views expressed in **N.P. Ponnuswami** and **Jyoti Basu**, and held:

"the right to vote, if not a fundamental right, is certainly a constitutional right. The right originates from the Constitution and in accordance with the constitutional mandate contained in Article 326, the right has been shaped by the statute, namely, R.P. Act. That, in my understanding, is the correct legal position as regards the nature of the right to vote in elections to the House of people and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple."

56. Justice Venkatarama Reddi then distinguished the constitutional right to vote with the act of giving vote/freedom of voting. He held:

"a distinction has to be drawn between the conferment of the right to vote on fulfillment of requisite criteria and the culmination of that right in the final act of expressing choice towards a particular candidate by means of ballot. Though the initial right cannot be placed on the pedestal of a fundamental right, but, at the stage when the voter goes to the polling booth and casts his vote, his freedom to express arises. The casting of vote in favour of one or the other candidate tantamounts to expression of his opinion and preference and that final stage in the exercise of voting right marks the accomplishment of freedom of expression of the voter. That is where Article 19(1)(a) is attracted. Freedom of voting as distinct from right to vote is thus a species of freedom of expression and therefore carries with it the auxiliary and complementary rights such as right to secure information about the candidate which are conducive to the freedom. None of the decisions of this Court wherein the proposition that the right to vote is a pure and simple statutory right was declared and reiterated, considered the question whether the citizen's freedom of expression is or is not involved when a citizen

entitled to vote casts his vote in favour of one or the other candidate...”

In his conclusions, he noted:

“The right to vote at the elections to the House of people or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1)(a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter.”

57. Justice DM Dharmadhikari expressed his agreement with the view taken by Justice Venkatarama Reddi, thus making it a majority decision holding that the right to vote is a constitutional right. Even Justice Shah had held that the right of adults to take part in the election process as a voter could only be restricted by a valid law which does not offend constitutional provisions.

58. An argument based on the majority view in **PUCL 2003** was put forth before a Constitution Bench of this Court in **Kuldip Nayar and Others v. Union of India and Others**³⁷ (hereinafter “**Kuldip Nayar**”). It was argued that a right to vote is a constitutional right besides that it is also a facet of fundamental right under Article 19(1)(a) of the

³⁷ (2006) 7 SCC 1

Constitution. The Constitution bench rejected the argument. It was held:

“The argument of the petitioners is that the majority view in the case of People's Union for Civil Liberties, therefore, was that a right to vote is a constitutional right besides that it is also a facet of fundamental right under Article 19(1)(a) of the Constitution.

We do not agree with the above submission. It is clear that a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression, while reiterating the view in *Jyoti Basu v. Debi Ghosal* (supra) that a right to elect, fundamental though it is to democracy, is neither a fundamental right nor a common law right, but pure and simple, a statutory right.

Even otherwise, there is no basis to contend that the right to vote and elect representatives of the State in the Council of States is a Constitutional right. Article 80(4) merely deals with the manner of election of the representatives in the Council of States as an aspect of the composition of the Council of States. There is nothing in the Constitutional provisions declaring the right to vote in such election as an absolute right under the Constitution.”

59. The Constitution Bench in **Kuldip Nayar** seems to have missed the point that Justice Venkatarama Reddi’s opinion in **PUCL 2003** that the right to vote is a constitutional right was explicitly concurred by Justice Dharmadhikari. Therefore, **Kuldip Nayar’s** view that **PUCL 2003** considered the right to vote/elect as a statutory right does not seem to portray the correct picture.

60. In **Desiya Murpokku Dravida Kazhagam and Another v. Election Commission of India**,³⁸ a three-judge bench was

³⁸ 2009 (16) SCC 781

considering a challenge to the constitutional validity of the amendment of the Election Symbols (Reservation and Allotment) Order, 1968, which mandated that in order to be recognized as a State party in the State, a political party would have to secure not less than 6% of the total valid votes polled in the State and should also have returned at least 2 members to the Legislative Assembly of the State. The counsel for the Election Commission of India in the case had argued that since the right to vote was a statutory right, it could not be questioned by way of a writ petition. The majority by 2:1 upheld the amendment. However, Justice Chelameswar wrote a dissenting opinion. The dissenting judge also addressed the counsel for the Election Commission of India that the right to vote is merely a statutory right. He held:

“The right to elect flows from the language of Articles 81 and 170 r/w Articles 325 and 326. Article 326 mandates that the election to the Lok Sabha and legislative Assemblies shall be on the basis of Adult Suffrage, i.e., every citizen, who is of 18 years of age and is not otherwise disqualified either under the Constitution or Law on the ground specified in the Article Shall Be entitled to be registered as a voter. Article 325 mandates that there shall be one general electoral roll for every territorial constituency. It further declares that no person shall be ineligible for inclusion in such electoral roll on the grounds only of religion, race, caste, sex, etc. Articles 81 and 170 mandate that the members of the Lok Sabha and Legislative Assembly are required to be Chosen by Direct Election from the territorial constituencies in the States. The States are mandated to be divided into territorial constituencies under Articles 81(2) (b) and 170(2)17. The cumulative effect of all the above mentioned provisions is that the Lok Sabha and the Legislative Assemblies are

to consist of members, who are to be elected by all the citizens, who are of 18 years of age and are not otherwise disqualified, by a valid law, to be voters. Thus, a Constitutional right is created in all citizens, who are 18 years of age to choose (participate in the electoral process) the members of the Lok Sabha or the Legislative Assemblies. Such a right can be restricted by the appropriate Legislature only on four grounds specified under Article 326.”

61. Justice Chelameswar also clarified that the question whether the right to vote or contest at any election to the Legislative Bodies created by the Constitution did not arise in the case of **N.P. Ponnuswami**, which is cited as an authority on the right to vote. He noted:

“With due respect to their Lordships, I am of the opinion that both the statements (extracted above) are overbroad statements made without a complete analysis of the scheme of the Constitution regarding the process of election to the Legislative Bodies adopted in subsequent decisions as a complete statement of law. A classical example of the half truth of one generation becoming the whole truth of the next generation.”

62. The majority decision in this case did not record any disagreement regarding the conclusion that the right to participate in the electoral process, either as a voter or as a candidate, is a constitutional right.

63. In 2013, the correctness of **ADR** and **PUCL 2003** was doubted before a three judge-bench of this Court in **People’s Union for Civil Liberties and Another v. Union of India and Another**³⁹ (**PUCL**

³⁹ (2013) 10 SCC 1

2013). In this case, the validity of certain rules of the Conduct of Election Rules, 1961 to the extent that these provisions violate the secrecy of voting which is fundamental to the free and fair elections. It was put forward that the Constitution bench judgment in **Kuldip Nayar** created a doubt on **ADR** and **PUCL 2003**. The three-judge bench in **PUCL 2013** held that “**Kuldip Nayar** does not overrule the other two decisions rather it only reaffirms what has already been said by the two aforesaid decisions”. However, the three-judge bench went on to note that:

“... there is no contradiction as to the fact that right to vote is neither a fundamental right nor a Constitutional right but a pure and simple statutory right. The same has been settled in a catena of cases and it is clearly not an issue in dispute in the present case.”

64. While the scope of the right to vote was not before **PUCL 2013**, but it went on to observe that the right to vote is only a statutory right. But, the three-judge bench in **PUCL 2013** followed **ADR** and **PUCL 2003** to reiterate that “[t]he casting of the vote is a facet of the right of expression of an individual and the said right is provided under Article 19(1)(a) of the Constitution of India”, and therefore, a prima facie case existed for the exercise of jurisdiction of this Court under Article 32. The bench concluded that:

“No doubt, the right to vote is a statutory right but it is equally vital to recollect that this statutory right is the essence of democracy. Without this, democracy will fail to thrive. Therefore, even if the right to vote is statutory, the significance attached with the right is massive. Thus, it is necessary to keep in mind these facets while deciding the issue at hand.”

65. A clarity on the status of the right to vote was given in the judgment in **Raj Bala v. State of Haryana and Others**.⁴⁰ Justice Chelameswar and Justice Sapre gave separate concurring opinions. After analysing the previous decisions of this Court, Justice Chelameswar came to the conclusion that “every citizen has a constitutional right to elect and to be elected to either Parliament or the State legislatures.” Justice Sapre reiterated the view taken in **PUCL 2003** that the “right to vote” is a constitutional right but not merely a statutory right.

66. What emerges from this detailed discussion is that there has been a conflicting view on the status of the right to vote. This gives an opportunity for us to authoritatively hold that the right to vote is not just a statutory right. In our view, we must look beyond that. Our decision to analyse the contours of the right to vote is facilitated by the reasoning provided by the nine-judge bench in **K.S. Puttaswamy**.

⁴⁰ (2016) 1 SCC 463

In that case, a plea was made that since privacy was not included as a fundamental right in the original Constitution, it cannot be declared a fundamental right. The bench rejected this argument, and held:

“it cannot be concluded that the Constituent Assembly had expressly resolved to reject the notion of the right to privacy as an integral element of the liberty and freedoms guaranteed by the fundamental rights... The interpretation of the Constitution cannot be frozen by its original understanding. The Constitution has evolved and must continuously evolve to meet the aspirations and challenges of the present and the future.”

67. In the instant case, the provision on adult franchise is in Article 326 of the Constitution. An analysis of Constituent Assembly Debates shows that it was initially considered as a fundamental right in the proceedings of the Advisory Committee. The only reason why it was shifted from fundamental rights status to another constitutional provision was that the founders did not want to offend the Princely States, with whom they were negotiating to be a part of a united India. Otherwise, they had stressed the importance of the right to vote and universal adult franchise. Seventy-five years after Independence, we have the opportunity to realize their absolute vision by recognizing what they could not do due to socio-political circumstances of their time. When the Constitution came into force,

what were known as Princely States became a part of India, and accepted direct elections as a method of choosing the government. These areas have now been included in different states. Therefore, there has been no objection to the right to vote.

68. The right to take part in the conduct of public affairs as a voter is the core of the democratic form of government, which is a basic feature of the Constitution. The right to vote is an expression of the choice of the citizen, which is a fundamental right under Article 19(1)(a). The right to vote is a part of a citizen's life as it is their indispensable tool to shape their own destinies by choosing the government they want. In that sense, it is a reflection of Article 21. In history, the right to vote was denied to women and those were socially oppressed. Our Constitution took a visionary step by extending franchise to everyone.⁴¹ In that way, the right to vote enshrines the protection guaranteed under Article 15 and 17. Therefore, the right to vote is not limited only to Article 326, but flows through Article 15, 17, 19, 21. Article 326 has to be read along with these provisions. We therefore declare the right to vote in direct elections as a fundamental right, subject to limitations laid down in

⁴¹ <https://journals.library.brandeis.edu/index.php/caste/article/view/282/63>

Article 326. This Court has precedents to support its reasoning. In **Unnikrishnan J.P. and Others v. State of Andhra Pradesh and Others**,⁴² this Court read Article 45 and 46 along with Article 21 to hold that the right to education is a fundamental right for children between the age group of 6-14.

69. Now that we have held that the right to vote is not merely a constitutional right, but a component of Part III of the Constitution as well, it raises the level of scrutiny on the working of the Election Commission of India, which is responsible for conducting free and fair elections. As it is a question of constitutional as well as fundamental rights, this Court needs to ensure that the working of the Election Commission under Article 324 facilitates the protection of people's voting rights.

C. Free and Fair Elections

70. Democracy works when the citizens are given a chance to decide the fate of the ruling government by casting their vote in periodical elections. The faith of the citizens in the democratic processes is

⁴² (1993) 1 SCR 594

ensured by conducting free and fair elections through an independent and neutral agency.

71. Free and fair elections have been enshrined as a precedent for the working of democracy in global conventions and rights-based frameworks. The Universal Declaration of Human Rights 1948 recognizes that:

“1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right of equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”⁴³

72. Article 25 of the International Covenant on Civil and Political Rights provides:

“Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.”

⁴³ Article 21, Universal Declaration of Human Rights

73. India is committed to these international frameworks. This Court has previously read India's obligation to international frameworks to recognise new areas of constitutional discourse, which are explicitly not covered by the provisions of the Constitution or where there is a constitutional vacuum.⁴⁴ But free and fair elections have been recognised as an essential feature of the democratic apparatus by the judgments of this Court as well.

74. In **Indira Nehru Gandhi Smt v. Shri Raj Narain and Another**,⁴⁵ Justice HR Khanna held in his opinion:

“All the seven Judges [in Kesavananda Bharti case] who constituted the majority were also agreed that democratic set-up was part of the basic structure of the Constitution. Democracy postulates that there should be periodical election, so that people may be in a position either to re-elect the old representatives or, if they so choose, to change the representatives and elect in their place other representative. Democracy further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of deference to mass opinion. Free and fair elections require that the candidates and their agents should not resort to unfair means or malpractices as may impinge upon the process of free and fair elections.”

⁴⁴ Vishakha v. State of Rajasthan, AIR 1997 SC 3011

⁴⁵ AIR 1975 SC 2299

75. For conducting free and fair elections, an independent body in the form of Election Commission is a must. In **Mohindhr Singh Gill**, a Constitution Bench was called to interpret Article 324 and Article 329(b) of the Constitution. emphasized on the connection between elections and the role of the Election Commission. Justice Krishna Iyer (speaking for Chief Justice Beg, Justice Bhagwati, and himself) stated:

“Democracy is government by the people. It is a continual participative operation, not a cataclysmic, periodic exercise. The little man, in his multitude, marking his vote at the poll does a social audit of his Parliament plus political choice of this proxy. Although the full flower of participative Government rarely blossoms, the minimum credential of popular Government is appeal to the people after every term for a renewal of confidence. So we have adult franchise and general elections as constitutional compulsions. “The right of election is the very essence of the constitution” (Junius). It needs little argument to hold that the heart of the Parliamentary system is free and fair elections periodically held, based on adult franchise, although social and economic democracy may demand much more.”

76. It was emphasized by Justice Krishna Iyer:

“The Election Commission is an institution of central importance and enjoys far-reaching powers and the greater the power to affect others' right or liabilities the more necessary the need to hear.”

77. Justice PK Goswami in his concurring opinion (for himself & PN Singhal) held:

“Elections supply the visa viva to a democracy. It was, therefore, deliberately and advisedly thought to be of paramount importance that the high and independent office of the Election Commission should be created under the Constitution to be in complete charge of the entire electoral process commencing with the issue of the notification, by the President to the final declaration of the result.”

78. Justice Goswami further emphasized on the need of independence of the Election Commission in the following words:

“The Election Commission is a high-powered and independent body which is irremovable from office except in accordance with the provisions of the Constitution relating to the removal of Judges of the Supreme Court and is intended by the framers of the Constitution, to be kept completely free from any pulls and pressures that may be brought through political influence in a democracy run on party system.”

79. The importance of periodical elections was also emphasized in the Constitution Bench decision in **Manoj Narula v. Union of India**,⁴⁶ which held:

“In the beginning, we have emphasized on the concept of democracy which is the corner stone of the Constitution. There are certain features absence of which can erode the fundamental values of democracy. One of them is holding of free and fair election by adult franchise in a periodical manner... for it is the heart and soul of the parliamentary system.”

80. Thus, the role of the Election Commission is integral to conducting free and fair elections towards the working of democracy.

⁴⁶ (2014) 9 SCC 1

It is the duty and constitutional obligation of this Court to protect and nurture the independence of the Election Commission.

IV. Constitutional and statutory framework: The Constitutional Vacuum

81. Article 324 of the Constitution provides that superintendence, direction and control of elections shall be vested in an Election Commission. Clause 1 of Article 324 provides:

“The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of President and Vice-President held under this Constitution shall be vested in a Commission (referred to in this Constitution as the Election Commission).”

82. The composition of the Election Commission is provided under Clause (2) of Article 324. It provides:

“The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.”

83. Article 324(3) states that the Chief Election Commissioner shall act as the Chairman of the Election Commission.

84. Clause (5) of Article 324 deals with conditions of service and tenure of office of the Election Commissioner. It provides that:

“Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine: Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment: Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.”

85. What comes out of this provision is that the Office of the Chief Election Commissioner stands on a higher constitutional pedestal, as he is given equivalence to a Judge of the Supreme Court in matters of removal. The other thing which comes out is that “the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment.” That is to say, the independence cannot be indirectly diluted by creating unwarranted conditions of service. Lastly, a wide discretion has been vested with the Chief Election Commissioner to seek removal of any other Election Commissioner or a Regional Commissioner.

86. It has been argued before us that there exists a constitutional vacuum in the method of selection of the Chief Election

Commissioner and other Election Commissioners, and nothing has been provided under Article 324. It has been argued that as the Executive (through President) is making these appointments, it reduces the independence of the Election Commission. Furthermore, it was pointed out that the term and tenure of the Election Commissioners also need to be streamlined in order to ensure absolute independence of the Election Commission and to prevent any arbitrary or biased decision to be taken by the Chief Election Commissioner.

87. It has been argued by the learned Attorney General that the conditions of service and tenure of the Chief Election Commissioner and Election Commissioners is already governed by the Act, 1991.

88. The Act provides “the conditions of service of the Chief Election Commissioner and other Election Commissioners to provide for the procedure and for transaction of business by the Election Commission and for matters] connected therewith or incidental thereto”. The Act deals with salary (Section 3), tenure/term of office (Section 4), leave (Section 5), pension (Section 6), and other conditions of service (Section 8).

89. The term of office provided under Section 4 for the Chief Election Commissioner or an Election Commissioner is “of six years from the date on which he assumes his office”, subject to the proviso that “where the Chief Election Commissioner or an Election Commissioner attains the age of sixty-five years before the expiry of the said term of six years, he shall vacate his office on the date on which he attains the said age”. Section 4 thus does not provide a mandatory 6 years of term.

90. An analysis of the provisions of the Act also indicates that there is nothing provided in terms of the selection process of the Chief Election Commissioner or the Election Commissioners. Thus, what emerges from this discussion is that both Article 324 and the Act, 1991 are silent on the selection process of the Chief Election Commissioner and the Election Commissioners. There also appears to be a lacunae in ensuring independence as the Act indirectly provides a discretion to the Executive to appoint someone close to retirement at the age of 65 as the Chief Election Commissioner or the Election Commissioner, and thus will not be able to take the full term of 6 years.

91. We need to look at the Constituent Assembly Debates to examine the level of independence which was expected from the Election Commission. Moving the draft Article on the Election Commission before the Constituent Assembly on 15 June 1949, Dr BR Ambedkar explained the vision behind the provision was independence from the executive in conducting elections. Dr Ambedkar said:

“... the House affirmed without any kind of dissent that in the interests of purity and freedom of elections to the legislative bodies, it was of the utmost importance that they should be freed from any kind of interference from the executive of the day... Therefore, so far as the fundamental question is concerned that the election machinery should be outside the control of the executive Government, there has been no dispute. What Article 289 does is to carry out that part of the decision of the Constituent Assembly. It transfers the superintendence, direction and control of the preparation of the electoral rolls and of all elections to Parliament and the Legislatures of States to a body outside the executive to be called the Election Commission. That is the provision contained in sub-clause (1).”⁴⁷

92. The reason behind having a permanent office of Chief Election Commissioner was explained by Dr Ambedkar as follows:

“What the Drafting Committee proposes by sub-clause (2) is to have permanently in office one man called the Chief Election Commissioner, so that the skeleton machinery would always be available. Elections no doubt will generally take place at the end of five years; but there is this question, namely that a bye-election may take place at any time. The Assembly may be dissolved before its period of five years has expired. Consequently, the electoral rolls will

⁴⁷ Constituent Assembly Debates, 15 June 1949, <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C15061949.html>

have to be kept up to date all the time so that the new election may take place without any difficulty. It was therefore felt that having regard to these exigencies, it would be sufficient if there was permanently in session one officer to be called the Chief Election Commissioner, while when the elections are coming up, the President may further add to the machinery by appointing other members to the Election Commission.”

93. The above statement suggests that the office of the Chief Election Commissioner requires a kind of permanency, which may be fulfilled by having someone with a stable full term as the Chief Election Commission.

94. Regarding the conditions of service, Dr Ambedkar said:

“So far as clause (4) is concerned, we have left the matter to the President to determine the conditions of service and the tenure of office of the members of the Election Commission, subject to one or two conditions, that the Chief Election Commissioner shall not be liable to be removed except in the same manner as a Judge of the Supreme Court. If the object of this House is that all matters relating to Elections should be outside the control of the Executive Government of the day, it is absolutely necessary that the new machinery which we are setting up, namely, the Election Commission should be irremovable by the executive by a mere fiat. We have therefore given the Chief Election Commissioner the same status so far as removability is concerned as we have given to the Judges of the Supreme Court. We, of course, do not propose to give the same status to the other members of the Commission. We have left the matter to the President as to the circumstances under which he would deem fit to remove any other member of the Election Commission; subject to one condition that-the Chief Election Commissioner must recommend that the removal is just and proper.”

95. However, Shibban Lal Saxena pointed out that the draft provision may favour the Executive in the appointment of the Chief

Election Commissioner and the Election Commissioners, and therefore appealed for a change in the provision. He argued:

“If the President is to appoint this Commission, naturally it means that the Prime Minister appoints this Commission. He will appoint the other Election Commissioners on his recommendations. Now, this does not ensure their independence. Of course once he is appointed, he shall not be removable except by 2/3rd majority of both Houses. That is certainly something which can instill independence in him, but it is quite possible that some party in power who wants to win the next election may appoint a staunch party-man as the Chief Election Commissioner. He is removable only by 2/3rd majority of both Houses on grave charges, which means he is almost irremovable. So what I want is this that even the person who is appointed originally should be such that he should be enjoying the confidence of all parties his appointment should be confirmed not only by majority but by two-thirds majority of both the Houses...Of course, there is a danger when one party is in huge majority. Still, if he does appoint a party-man, and the appointment comes up for confirmation in a joint session, even a small opposition or even a few independent members can down the Prime Minister before the bar of public opinion in the world.”

96. On 16 June 1949, Hirday Nath Kunzru echoed a similar sentiment, and also highlighted the issues regarding the removal of the Election Commissioners. He said:

“Here two things are noticeable: the first is that it is only the Chief Election Commissioner that can feel that he can discharge his duties without the slightest fear of incurring the displeasure of the executive, and the second is that the removal of the other Election Commissioners will depend on the recommendations of one man only, namely the Chief Election Commissioner. However responsible he may be it seems to me very undesirable that the removal of his colleagues who will occupy positions as responsible as those of judges of the Supreme Court should depend on the opinion of one man. We are anxious, Sir, that the preparation of the electoral rolls and the conduct of elections should be entrusted to people who are free from political bias and whose impartiality can be relied upon in all circumstances. But, by leaving a great deal of power in the hands

of the President we have given room for the exercise of political influence in the appointment of the Chief Election Commissioner and the other Election Commissioners and officers by the Central Government. The Chief Election Commissioner will have to be appointed on the advice of the Prime Minister, and, if the Prime Minister suggests the appointment of a party-man, the President will have no option but to accept the Prime Minister's nominee, however unsuitable he may be on public grounds.”

97. He warned thus:

“If the electoral machinery is defective or is not efficient or is worked by people whose integrity cannot be depended upon, democracy will be poisoned at the source; nay, people, instead of learning from elections how they should exercise their vote, how by a judicious use of their vote they can bring about changes in the Constitution and reforms in the administration, will learn only how parties based on intrigues can be formed and what unfair methods they can adopt to secure what they want.”

98. Dr Ambedkar agreed with the points made by Saksena and Kunzru, and said:

“...with regard to the question of appointment I must confess that there is a great deal of force in what my Friend Professor Saksena said that there is no use making the tenure of the Election Commissioner a fixed and secure tenure if there is no provision in the Constitution to prevent either a fool or a knave or a person who is likely to be under the thumb of the Executive. My provision—I must admit—does not contain anything to provide against nomination of an unfit person to the post of the Chief Election Commissioner or the other Election Commissioners...”

99. The solution which Dr Ambedkar gave was that the Constituent Assembly should adopt as “Instrument of Instructions to the President”, which may consist of the guidelines according to which the President has to make the appointments. He said:

“The Drafting Committee had paid considerable attention to this question because as I said it is going, to be one of our greatest headaches and as a *via media* it was thought that if this Assembly would give or enact what is called an Instrument of Instructions to the President and provide therein some machinery which it would be obligatory on the President to consult before making any appointment, I think the difficulties which are felt as resulting... may be obviated and the advantage which is contained therein may be secured.”

100. He, however, added that since he was unsure whether the Assembly would adopt his suggestion of Instrument of Instructions, he suggested an amendment to the effect that “The appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the Provisions of any law made in this behalf by Parliament, be made by the President.” This is incorporated currently in Article 324(2). The idea behind this amendment was that the “law made in this behalf by Parliament” would address the concerns and fear raised by members of the Constituent Assembly that the Executive should not have the exclusive say in the appointment of the Chief Election Commissioner and the Election Commissioners. However, we find that the Act, 1991 does not cover any aspect highlighted in the Constituent Assembly. It is for this reason that this Court needs to lay down certain broader parameters to fill the constitutional/legislative gap.

V. The Judgment in TN Seshan

101. It would be relevant to quote the following excerpt from the Constitution-bench judgment of this Court in ***T.N. Seshan, Chief Election Commissioner of India v. Union of India and Others***⁴⁸:

“10. The Preamble of our Constitution proclaims that we are a Democratic Republic. Democracy being the basic feature of our constitutional set-up, there can be no two opinions that free and fair elections to our legislative bodies alone would guarantee the growth of a healthy democracy in the country. 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.”

102. In that case, a petition challenged the validity of "The Chief Election Commissioner and other Election Commissioners (Condition of Service) Amendment Ordinance, 1993" (hereinafter called 'the Ordinance') to amend the Act, 1991. While upholding the amendment, the court discussed the role of the election commission being a multi member body and the relation between CEC and other ECs. Some important points highlighted were as follows:

“The ECs and the RCs have been assured independence of functioning by providing that they cannot be removed except on the

⁴⁸ (1995) 4 SCC 611

recommendation of the CEC. Of course, the recommendation for removal must be based on intelligible, and cogent considerations which would have relation to efficient functioning of the Election Commission. That is so because this privilege has been conferred on the CEC to ensure that the ECs as well as the RCs are not at the mercy of political or executive bosses of the day.... If, therefore, the power were to be exercisable by the CEC as per his whim and caprice, the CEC himself would become an instrument of oppression and would destroy the independence of the ECs and the RCs if they are required to function under the threat of the CEC recommending their removal. It is, therefore, needless to emphasise that the CEC must exercise this power only when there exist valid reasons which are conducive to efficient functioning of the Election Commission.”

Held further:

“15. We have already highlighted the salient features regarding the composition of the Election Commission. We have pointed out the provisions regarding the tenure, conditions of service, salary, allowances, removability, etc., of the CEC, the ECs and the RCs. The CEC and the ECs alone constitute the Election Commission whereas the RCs are appointed merely to assist the Commission...”

Furthermore:

“17. Under clause (3) of Article 324, in the case of a multi-member Election Commission, the CEC “shall act” as the Chairman of the Commission. As we have pointed out earlier, Article 324 envisages a permanent body to be headed by a permanent incumbent, namely, the CEC. The fact that the CEC is a permanent incumbent cannot confer on him a higher status than the ECs for the simple reason that the latter are not intended to be permanent appointees. Since the Election Commission would have a staff of its own dealing with matters concerning the superintendence, direction and control of the preparation of electoral rolls, etc., that staff would have to function under the direction and guidance of the CEC and hence it was in the fitness of things for the Constitution-makers to provide that where the Election Commission is a multi-member body, the CEC shall act as its Chairman. That would also ensure continuity and smooth functioning of the Commission.”

Also, held:

“21. We have pointed out the distinguishing features from Article 324 between the position of the CEC and the ECs. It is essentially on account of their tenure in the Election Commission that certain differences exist. We have explained why in the case of ECs the removability clause had to be different. The variation in the salary, etc., cannot be a determinative factor otherwise that would oscillate having regard to the fact that the executive or the legislature has to fix the conditions of service under clause (5) of Article 324. The only distinguishing feature that survives for consideration is that in the case of the CEC his conditions of service cannot be varied to his disadvantage after his appointment whereas there is no such safeguard in the case of ECs. That is presumably because the posts are temporary in character. But even if it is not so, that feature alone cannot lead us to the conclusion that the final word in all matters lies with the CEC. Such a view would render the position of the ECs to that of mere advisers which does not emerge from the scheme of Article 324.”

(emphasis added)

103. The judgment in **T.N. Seshan** did not directly consider the issues which are before this Bench. Furthermore, the observations made in **T.N. Seshan** indicate that the Election Commissioners were not mere advisors, but have a crucial constitutional role.

VI. Reports of Various Commissions on Manner of Appointment of Chief Election Commissioner and Election Commissioners:

A. Dinesh Goswami Commission, 1990⁴⁹

“Appointment of CEC

1. The appointment of the Chief Election Commissioner should be made by the President in consultation with the Chief Justice of

⁴⁹ Dinesh Goswami Commission (1990), Chapter II, Electoral Machinery, pg. 9, 10, Available at: [https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.p](https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf)
[df](https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf)

India and the Leader of the Opposition (and in case no Leader of the opposition is available, the consultation should be with the leader of the largest opposition group in the Lok Sabha).

2. The consultation process should have a statutory backing.
3. The appointment of the other two Election Commissioners should be made in consultation with the Chief Justice of India, Leader of the Opposition (in case the Leader of the opposition is not available, the consultation should be with the leader of the largest opposition group in the Lok Sabha) and the Chief Election Commissioner.”

B. National Commission to Review the Working of Constitution-Report (2002)⁵⁰

“(62) The Chief Election Commissioner and the other Election Commissioners should be appointed on the recommendation of a body consisting of the Prime Minister, Leader of the Opposition in the Lok Sabha, Leader of the Opposition in the Rajya Sabha, the Speaker of the Lok Sabha and the Deputy Chairman of the Rajya Sabha. Similar procedure should be adopted in the case of appointment of State Election Commissioners. [Para 4.22]”

C. Election Commission of India Proposed Reforms (2004)⁵¹

“The independence of the Election Commission upon which the Constitution makers laid so much stress in the Constitution would be further strengthened if the Secretariat of the Election Commission consisting of officers and staff at various levels is also insulated from the interference of the Executive in the matter of their appointments, promotions, etc., and all such functions are exclusively vested in the Election Commission on the lines of the Secretariats of the Lok Sabha, and Rajya Sabha, Registries of the

⁵⁰ National Commission to Review the Working of Constitution-Report (2002) Para 4.22, pg. 14 , Available at: https://www.thehinducentre.com/multimedia/archive/03091/ncrwc_3091109a.pdf

⁵¹ Election Commission of India Proposed Reforms (2004), 12. COMPOSITION OF ELECTION COMMISSION AND CONSTITUTIONAL PROTECTION OF ALL MEMBERS OF THE COMMISSION AND INDEPENDENT SECRETARIAT FOR THE COMMISSION, Pg. 14, 15, available at: https://prsindia.org/files/bills_acts/bills_parliament/2008/bill200_20081202200_Election_Commission_Proposed_Electoral_Reforms.pdf

Supreme Court and High Courts, etc. The Independent Secretariat is vital to the functioning of the Election Commission as an independent constitutional authority. In fact, the provision of an independent Secretariat to the Election Commission has already been accepted in principle by the Goswami Committee on Electoral Reforms and the Government had, in the Constitution (Seventieth Amendment) Bill, 1990, made a provision also to that effect. That Bill was, however, withdrawn in 1993 as the Government proposed to bring in a more comprehensive Bill.”

D. Report of Second Administrative Reform Commission (2009)⁵²

“In recent times, for statutory bodies such as the National Human Rights Commission (NHRC) and the Central Vigilance Commission (CVC) , appointment of Chairperson and Members are made on the recommendations of a broad based Committee. Given the far reaching importance and critical role of the Election Commission in the working of our democracy, it would certainly be appropriate if a similar collegium is constituted for selection of the Chief Election Commissioner and the Election Commissioners.”

E. Background Paper on Electoral Reform, Ministry of Law & Justice (2010)⁵³

“Recommendation

Clause (5) of Article 324 of the Constitution, inter alia, provides that the Chief Election Commissioner shall not be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court. However, Clause (5) of Article 324 does not provide similar protection to the Election Commissioners and it only says that they cannot be removed from office except on the recommendation of the Chief Election Commissioner. The provision, in the opinion of the Election Commission, is inadequate and requires an amendment to provide the very same protection and safeguard in the matter of removability of Election Commissioners

⁵² Report of Second Administrative Reform Commission (2009), Pg. 79, Available at: <https://darpg.gov.in/en/arc-reports>

⁵³ Background Paper on Electoral Reform, Ministry of Law & Justice (2010), 6.3 Measures for Election Commission, pg. 19, Available at: https://lawmin.gov.in/sites/default/files/bgp_0.doc

from office as is provided to the Chief Election Commissioner. The Election Commission recommends that constitutional protection be extended to all members of the Election Commission.

The Election Commission also recommends that the Secretariat of the Election Commission, consisting of officers and staff at various levels is also insulated from the interference of the Executive in the matter of their appointments, promotions, etc., and all such functions are exclusively vested in the Election Commission on the lines of the Secretariats of the Lok Sabha, and Rajya Sabha, Registries of the Supreme Court and High Courts etc.

The third recommendation of the Election Commission is that its budget be treated as “Charged” on the Consolidated Fund of India.”

F. Law Commission of India Report, 2015 (255th Report)⁵⁴

104. Taking note of the important role played by the Election Commission of India i.e., the task of conducting elections throughout the country, the Law Commission in its 255th Report emphasized that the Commission should be completely insulated from political pressure or executive interference to maintain the purity of elections, inherent in a democratic process, and recommended:

“Appointment of Chief Election Commissioner and Election Commissioners – (1) The Election Commissioners, including the Chief Election Commissioners, shall be appointed by the President by warrant under his hand and seal after obtaining the recommendations of a Committee consisting of: (a) the Prime Minister of India – Chairperson (b) the Leader of the Opposition in the House of the People – Member (c) the Chief Justice of India – Member

⁵⁴ 255th LAW COMMISSION OF INDIA REPORT, 2015, Chapter VI- STRENGTHENING THE OFFICE OF THE ELECTION COMMISSION OF INDIA, Available at:<https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081635.pdf>

Provided that after the Chief Election Commissioner ceases to hold office, the senior-most Election Commissioner shall be appointed as the Chief Election Commissioner, unless the Committee mentioned in sub-section (1) above, for reasons to be recorded in writing, finds such Election Commissioner to be unfit.

Explanation: For the purposes of this sub-section, “the Leader of the Opposition in the House of the People” shall, when no such Leader has been so recognised, include the Leader of the single largest group in opposition of the Government in the House of the People.”

105. The Law Commission also recommended the formation of an independent and permanent Secretariat staff for Election Commission and suggested that:

“The Election Commission shall have a separate independent and permanent secretarial staff. The Election Commission may, by rules prescribed by it, regulate the recruitment, and the conditions of service of persons appointed, to its permanent secretarial staff.”

106. These reports clearly indicate the need for reforms in the working of the Election Commission, in particular in the process of selection and removal of the members of the Election Commission.

VII. Comparative framework - Foundational parameters

107. An examination of practice for appointment of the head of election-conducting bodies across the world shows some trends that include amongst others, the inclusion of members of the opposition. In most jurisdictions, such appointments are a consultative process, involving members/ nominees of both the ruling party and the

opposition party. The presence of opposition in various critical decision-making processes of governance is a *sine qua non* for a healthy democracy. It not only provides a system of accountability of the ruling party but also ensures a much-crucial deliberative process. This, in turn, plays a pivotal role in preserving the true essence of democracy by raising the concerns of the people of the country. In addition, some jurisdictions also have Constitutional functionaries such as Speakers of the house of Parliament/ Legislature, and Judges of the Highest Court in the country in a multi-member Committee. Relevant details of electoral bodies of some countries are as follows:

S. NO	COUNTRY	Composition of Election Body	Composition of Selection Committee	Appointing Authority	Eligibility/ Tenure	Removal method/ measures to ensure Independence
1	PAKISTAN ⁵⁵	There shall be Chief Election Commissioner and 4 members who shall be High Court Judges from each Province. [Article 218 (2)]	PM in consultation with LOP in the National Assembly, forward 3 names for appointment of the commissioner to a parliamentary committee for hearing and	President	CEC- A Judge of the SC or has been a Judge of a High Court (qualified to be a Judge of the Supreme Court) [Art 213(2)] Members- Must be a High Court Judge. Not more than 68 years of age.	Under Article 215(2) of the constitution, the commissioner or a member can only be removed from office in a manner prescribed in Article 209 as the

⁵⁵ Constitution of Islamic Republic of Pakistan, available at : https://drive.google.com/file/d/1TMpGdvhpYXMh07ZQoS_SDxwQoH_C8itF/view?usp=sharing

S. NO	COUNTRY	Composition of Election Body	Composition of Selection Committee	Appointing Authority	Eligibility/ Tenure	Removal method/ measures to ensure Independence
			confirmation of any one person. The Parliamentary Committee to be constituted by the speaker shall comprise 50% members from the treasury Branch and 50% from opposition parties, to be nominated by respective Parliamentary leaders. [Article 213]		For a term of 5 years [Art 215(1)]	removal of judges i.e. if he has been guilty of misconduct
2	Bangladesh 56	The appointment of the Chief Election Commissioner of Bangladesh and other election commissioners (if any) is made by the president. When the election commission consists of more than	-CEC -Not more than four election Commissioner [Art 118 (1)]	President	Five years. [Art 118(3)] Not eligible for appointment in the service of the Republic. Any other Election Commissioner is, on ceasing to hold such office, eligible for appointment as Chief Election Commissioner, but is not eligible for appointment in the service of the Republic. [Art 118 (3)(b)]	that an Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court. An Election Commissioner may resign his office by writing

⁵⁶Constitution of the People's Republic of Bangladesh, Available at:
<https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/33095/73768/F-2125404014/BGD33095%20Eng2.pdf>

S. NO	COUNTRY	Composition of Election Body	Composition of Selection Committee	Appointing Authority	Eligibility/ Tenure	Removal method/ measures to ensure Independence
		one person, the chief election commissioner is to act as its chairman. [Art 118 (1)]				under his hand addressed to the President. [Art 118(5)]
3	Australia ⁵⁷	Section 6 of the Commonwealth Electoral Act 1918 (Electoral Act) establishes the Australian Electoral Commission (the Commission) a three person body which holds responsibilities outlined under section 7 of the Electoral Act.	-Chairperson -Electoral Commissioner - one other member [S.6(2)]	Chairperson and non-judicial appointee are appointed by Governor General.	-7 years [S.8(1)] The Commission is headed by a Chairperson, who must be an active or retired judge of the Federal Court of Australia. The other members are the Electoral Commissioner and a non-judicial member. eligible for re-appointment.	misbehaviour or physical or mental incapacity by Governor-General. [Art.25(1)]
4.	Canada ⁵⁸	Chief Electoral Officer (S.13 of Canada Elections Act)	-	Appointed by resolution of the House of commons	10 years [S.13(1)] Not eligible for re-appointment to that office.	He/She may be removed for cause by the Governor General on address of the Senate and House of

⁵⁷ Commonwealth Electoral Act,1918 available at: <https://www.legislation.gov.au/Details/C2022C00074>

⁵⁸ Canada Election Act, available at: <https://laws-lois.justice.gc.ca/eng/acts/E-2.01/page-2.html#docCont>

S. NO	COUNTRY	Composition of Election Body	Composition of Selection Committee	Appointing Authority	Eligibility/ Tenure	Removal method/ measures to ensure Independence
						Commons. [S.13(1)]
5	Sri Lanka ⁵⁹	Chairman and Four Members [Art. 103(1)]	In making such appointments the President shall seek the observations of a Parliamentary Council (hereinafter referred to as “the Council”), comprising – (a) the Prime Minister; (b) the Speaker; (c) the Leader of the Opposition; (d) a nominee of the Prime Minister, who shall be a Member of Parliament; and (e) a nominee of the Leader of the Opposition, who shall be a Member of Parliament.	President	To be selected amongst persons who have distinguished themselves in any profession or in the field of administration or education. One of the members so appointed shall be a retired officer of the Department of Elections or Election Commission, who has held office as a Deputy Commissioner of Elections or above. The President shall appoint one member as its Chairman. The term of office of members of the Elections Commission is five years. [Art. 103(6)]	The procedure followed in removing a Judge of the Supreme Court or the Court of Appeal should be followed in removing a member from office during the period of the term of office. [Art 103(4)] A member of the Commission shall be paid such emoluments as may be determined by Parliament. The emoluments paid to a member of the Commission shall be charged on the Consolidated

⁵⁹ Constitution of Sri Lanka-

https://drive.google.com/file/d/1W5j3D_8CUiYjox8t8eUSlg7SFifjmebK/view?usp=sharing

S. NO	COUNTRY	Composition of Election Body	Composition of Selection Committee	Appointing Authority	Eligibility/ Tenure	Removal method/ measures to ensure Independence
						Fund and shall not be diminished during the term of office of the member. [Art 103(8)]
6	United States of America ⁶⁰	The Federal Election Commission consists of 6 election commissioners, and not more than 3 members, may represent the same political party. [S.306(a)(1)]	The Commission is appointed by the President and confirmed by the Senate.	President and confirmed by the Senate	-Each commissioner is appointed for a six-year term -Two commissioners are appointed every two years. -The Chair of Commission changes every year. [S.306(2)(a)]	
7	Nepal ⁶¹	Chief Election Commissioner and four other Election Commissioners [Art 245(1)]	The President shall, on the recommendation of the Constitutional Council (Art.284) Comprising of: a. Prime Minister - Chairperson b. Chief Justice-Member c. Speaker of	President	a. holds a Bachelor's Degree from a recognized university, b. is not a member of any political party immediately before the appointment; c. has attained the age of forty-five and d. possesses high moral character. [Art. 245(6)] Six Years [Art.	Removal by the President on recommendation of the Constitutional Council on grounds of his or her inability to hold office and discharge the functions due to physical or mental

⁶⁰ FEDERAL ELECTION CAMPAIGN ACT OF 1971, available at: <https://www.govinfo.gov/content/pkg/COMPS-985/pdf/COMPS-985.pdf>

⁶¹ Constitution of Nepal, Available at: <https://lawcommission.gov.np/en/wp-content/uploads/2021/01/Constitution-of-Nepal.pdf>

S. NO	COUNTRY	Composition of Election Body	Composition of Selection Committee	Appointing Authority	Eligibility/ Tenure	Removal method/ measures to ensure Independence
			<p>the House of Representatives - Member</p> <p>d. Chairperson of National Assembly - Member</p> <p>e. Leader from the Opposition Party in House of Representative-Member</p> <p>f. Deputy Speaker of House of Representatives-Member),</p> <p>appoint the Chief Election Commissioner and the Election Commissioners.</p>		245(3)]	illness. [Art. 245(4)(d)]
8	South Africa ⁶²	The Commission shall consist of five members, one of whom shall be a judge, appointed by the President. [S.6(1)]	<p>Panel shall consist of:</p> <p>(a) President of the constitutional court-Chair-person</p> <p>(b) Representative of the human rights court.</p> <p>(c) representative of the</p>	President on nomination by committee of national assembly proportionally consisting of members of all the parties represented in that Assembly from a	<p>(a) is a South African citizen;</p> <p>(b) does not at that stage have a high party-political profile;</p> <p>(c)-has been recommended</p> <p>7 years [S.7(1)]</p> <p>Can be re-appointed for 1 more term</p>	<p>By the President:</p> <p>-on ground of misconduct, incapacity or incompetence -after a finding to that effect by a committee of the National Assembly upon the</p>

⁶² Electoral Commission Act 51 of 1996, available at:

https://www.gov.za/sites/default/files/gcis_document/201409/act51of1996.pdf

S. NO	COUNTRY	Composition of Election Body	Composition of Selection Committee	Appointing Authority	Eligibility/ Tenure		Removal method/ measures to ensure Independence
			<p>commission on gender equality</p> <p>(d) public prosecutor established. [Section 6(3)]</p>	<p>list of candidates recommended by the panel.</p>	<p>by the National Assembly by a resolution adopted by a majority of the members of that Assembly ; and (d) has been nominated by a committee of the National Assembly, proportionally composed of members of all parties represented in that Assembly , from a list of recommended candidates submitted to the committee by the panel referred to in sub-section (3) [S.6(2)]</p>		<p>recommendation of the Electoral Court, and -the adoption by a majority of the members of that Assembly of a resolution, calling for that commissioner's removal from office [S.7(3)(a)]</p>
9	United Kingdom	The Electoral Commission	The Speaker's Committee on the Electoral Commission,	If the House agrees	-	-	

S. NO	COUNTRY	Composition of Election Body	Composition of Selection Committee	Appointing Authority	Eligibility/ Tenure	Removal method/ measures to ensure Independence
	63	comprises of Ten commissioners that are appointed by the committee with membership drawn from MPs within the UK Parliament.	with membership drawn from MPs within the UK Parliament, oversees the recruitment of electoral commissioners . The candidates for these posts are then approved by the House of Commons and appointed by HM the Queen. The Speaker will ask the Leader of the House to table a motion for an humble Address to appoint the recommended candidates.	the motion, the King appoints the commissioners by Royal Warrant		

VIII. Process of Selection of other Constitutional/Statutory

Bodies

⁶³ <https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/about-us/commissioners/our-commissioners>

108. Various state institutions supporting constitutional democracy have an independent mechanism for the appointment of its heads and members. The same is carried out with an object to keep them insulated from any external influence that allows them to remain neutral to carry on the assigned functions. Table showing the position of various authorities is as follows:

S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Tenure	Conditions ensuring Independence
1.	National Human Rights Commission (The Protection of Human Rights Act, 1993)	NHRC composed of Chairperson and 12 other members (5 full time members and 7 deemed members) <i>(Section 3- Constitution of NHRC)</i> <i>The Protection of Human Rights Act, 1993</i>	The Selection Committee includes: <ul style="list-style-type: none"> • Prime Minister (Chairman) • Speaker of Lok Sabha, • Union Home Minister, • Deputy Chairman of Rajya Sabha, • Leaders of the Opposition in both Houses of the Parliament 	President (Section-4)	Chairman - retired Judge of the Supreme Court Member 1- One who has been judge of the SC Member 2- One who has been CJ of the HC 3 - Members out of which at least on shall be a woman among candidate with the knowledge or practical experience	<i>3 years or until the age of 70 years</i> <i>(Section 6. Term of office of Chairperson and Members)</i>	The President can remove the chairman or any member from the office under some circumstances

S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Tenure	Conditions ensuring Independence
					in the matter of Human Rights.		
2.	State Human Rights Commission (The Protection of Human Rights Act, 1993)	Chairperson and 2 members <i>(Section 22 Appointment of Chairperson and Members of State Commission)</i> <i>The Protection of Human Rights Act, 1993</i>	Appointed by the Governor on the recommendation of Committee consisting: <ul style="list-style-type: none"> • CM • Speaker of Legislative Assembly, • State Home Minister, • Leader of the Opposition in the Legislative Assembly 	Governor (S. 22)	Chairman – Retired Chief Justice or a judge of a HC Members-serving or retired judge of the HC or a District Court in the state	<i>3 years or 70 years whichever is earlier</i> <i>(Section 24 Term of office of Chairperson and Members of the State Commission)</i> Eligible for re-appointment	Removed only by the President
3.	CBI (headed by Director) (Delhi Special Police Establishment Act, 1946)	<i>(Section 4A Committee for appointment of Director)</i> <i>Delhi Special Police Establishment Act, 1946</i>	Central Government shall appoint Director of the CBI on the recommendation of the 3-member committee consisting of: <ul style="list-style-type: none"> • The Prime Minister as the Chairperson • Leader of Opposition in the Lok Sabha, and 	By Appointment Committee	-	2 years tenure <i>(Section 4B Terms and conditions of service of Director)</i> <i>Delhi Special Police Establishment Act, 1946</i>	President has the authority to remove or suspend the Director on the reference by the CVC, of misbehaviour or incapacity (Removal)

S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Tenure	Conditions ensuring Independence
			<ul style="list-style-type: none"> • CJI or Judge of the SC, nominated by him. 				
4.	Chief Information Commissioner (The Right to Information Act, 2005)	<ul style="list-style-type: none"> - Chief Information Commissioner - Central Information Commissioners (as deemed fit, maximum 10) <p><i>(Section 12 Constitution of Central Information Commission)</i></p> <p><i>Right to Information Act, 2005</i></p>	<ul style="list-style-type: none"> • Prime Minister (Chairman) • Leader of Opposition in the Lok Sabha • Union Cabinet Minister (nominated by the PM) 	President on the recommendation of the committee	<p>Persons of eminence in public life with wide knowledge and experience in law, science, and technology, social service, management, journalism, mass media or administration and governance.</p> <p>Shall not be a member of parliament or legislature of any state or UT and should not hold any office of profit under state.</p>	<p><i>...as may be prescribed by Central Government or 65, whichever is earlier</i></p> <p>- Shall be ineligible for re-appointment</p> <p>Information Commissioners can be appointed as CIC, provided the collective tenure of both posts does not exceed 5 years.</p> <p><i>(Section 13 Term of office and conditions of service)</i></p>	<p>Removal By President on ground of proven misbehaviour or incapacity (After SC's inquiry that such officer shall be removable on such grounds)</p> <p>Other grounds:</p> <ul style="list-style-type: none"> - insolvency - conviction of offense involving moral turpitude. - unfit due to infirmity of mind. - acquired financial interests inconsistent with his official position.

S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Tenure	Conditions ensuring Independence
5.	<p>Central Vigilance Commission</p> <p>(CVC Act, 2003)</p>	<ul style="list-style-type: none"> - Central Vigilance Commissioner - Vigilance Commissioners (not more than 2) <p><i>(Section 3 Constitution of Central Vigilance Commission)</i></p> <p><i>Central Vigilance Commission Act, 2003</i></p>	<ul style="list-style-type: none"> • Prime Minister (Chairman) • Leader of Opposition in the Lok Sabha • Minister of Home Affairs 	<p>President on the recommendation of the committee</p>	<p>For CVC</p> <ul style="list-style-type: none"> - Persons who are or have been in All India Service or Civil Service with experience in matters related to vigilance, policy-making, and administration including police administration. or - held or holding office in a corporation established under Central Government and having expertise and experience in finance including insurance and banking, law, vigilance and investigations 	<p><i>4 years from the date he enters office or 65 years, whichever is earlier.</i></p> <ul style="list-style-type: none"> - Shall be ineligible for re-appointment. - Vigilance Commissioner shall be eligible to be appointed as CVC, provided the collective tenure of both the posts does not exceed 4 years. <p><i>(Section 5 Terms and other conditions of service of Central Vigilance Commissioner)</i></p> <p><i>Central Vigilance Commission</i></p>	<p>Removal By President on ground of proved misbehaviour or incapacity</p> <p>(After SC's inquiry that such officer shall be removable on such grounds)</p> <p>Other grounds:</p> <ul style="list-style-type: none"> - insolvency - conviction of offense involving moral turpitude. - unfit due to infirmity of mind. - acquired financial interests inconsistent with his official position.

S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Tenure	Conditions ensuring Independence
						Act, 2003	
6.	Lokpal (Lokpal and Lokayukta Act, 2013)	Chairperson - other members (as deemed fit, not more than 50% shall be judicial members) <i>(Section 4 Appointment of Chairperson and Members on recommendations of the Selection Committee)</i> <i>Lokpal and Lokayuktas Act, 2013</i>	<ul style="list-style-type: none"> • Prime Minister (Chairman) • Leader of Opposition in the Lok Sabha • Speaker of House of the People • CJI/ Judge of SC • One eminent Jurist 	President on the recommendation of the committee	For Chairman - who is or has been a Chief Justice of India or is or has been a Judge of the Supreme Court or an eminent person of impeccable integrity and outstanding ability having special knowledge and expertise of not less than twenty-five years in the matters relating to anti-corruption policy, public administration, vigilance, finance including insurance and banking,	5 years from entering office or 70 years, whichever is earlier. (S.6) Shall be ineligible for: -re-appointment as Chairman or Member of Lokpal. - other appointment required to be made by President . - other office of profit under the government. - contesting election within a period of 5 years from relinquishing	By President on ground of proved misbehaviour or incapacity After SC's inquiry that such officer shall be removable on such grounds) Other grounds: - insolvency - unfit due to infirmity of mind. - engages in employment outside his office.

S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Tenure	Conditions ensuring Independence
					<p>law and management.</p> <p>Chairpersons and members shall not be:</p> <ul style="list-style-type: none"> - MP/MLA - less than 45 years - convicted of offence involving moral turpitude - member of Panchayat or municipality - person who has been dismissed or removed from services. 	<p>the post.</p> <p>: Member can be appointed as Chairman, provided aggregate term does not exceed 5 years.</p> <p><i>(Section 6 Term of office of Chairperson and Members)</i></p> <p><i>Lokpal and Lokayuktas Act, 2013.</i></p>	
7.	<p>Press Council of India</p> <p>(Press Council of India Act, 1978)</p>	<p>- Chairman</p> <p>- 28 other members</p> <p><i>(Section 5 Composition of the Council)</i></p>	<ul style="list-style-type: none"> • Chairman of the Council of States (Rajya Sabha) • Speaker of the House of 	<p>Different set of members are appointed according to the requirement of their roles. For chairman,</p>	<p>No working journalist who owns, or carries on the business of management of, any newspaper</p>	<p>3 years</p> <p><i>(Chairman & other Members)</i></p> <p><i>PROVISO – Chairman to continue to hold</i></p>	-

S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Tenure	Conditions ensuring Independence
		<i>Press Council Act, 1978</i>	<p>the People (Lok Sabha)</p> <ul style="list-style-type: none"> • A person elected by the members of the Council 	a committee is formed.	<p>shall be eligible for nomination</p> <p>(Proviso to Sec 5(3))</p>	<p><i>office until the Council is reconstituted in accordance with Section 5 or for a period of 6 months, whichever is earlier</i></p> <p>Retiring member eligible for only one term.</p> <p><i>(Section 6 Term of office and retirement of members)</i></p> <p><i>Press Council Act, 1978</i></p>	

IX. Constitutional Silence and Vacuum: Power of the Court to lay guidelines

109. This Court has plenary power under Article 142 to issue directions to do “complete justice”. An analysis of the judgments of

this Court shows that the Court has created a jurisprudence, where it has exercised its power under Article 142 to fill legislative gaps.⁶⁴ Reference can also be made to the speech given by Dr B.R. Ambedkar in the Constituent Assembly on 4 November 1948, where he noted that the Drafting Committee had tried to include detailed processes to avoid the misuse of power. Dr Ambedkar was emphasizing on a constitutional design which would prevent arbitrariness by laying down legal procedures to regulate power.⁶⁵

110. This Court has laid down guidelines in order to fill the legislative gap on a number of occasions. In **Lakshmi Kant Pandey v Union of India**,⁶⁶ in the absence of statutory enactment for the adoption of Indian children by foreign parents, their Court laid down safeguards to prevent malpractice by social organizations and private adoption agencies. Directions were provided in **Kumari Madhuri Patil and Another v Addl. Commissioner, Tribal Development and Others**⁶⁷ for issuance and early scrutiny of social status certificates (showing that a person belongs to SC/ST community) for admission in

⁶⁴ Krishnan RH and Bhaskar A, “Article 142 of the Indian Constitution: On the Thin Line between Judicial Activism and Restraint” in Salman Khurshid and others (eds), *Judicial Review: Process, Powers, and Problems (Essays in Honour of Upendra Baxi)* (Cambridge University Press 2020)

⁶⁵ <https://www.hindustantimes.com/opinion/ambedkars-constitutionalism-speaks-to-contemporary-times-101637851829964.html>

⁶⁶ AIR 1984 SC 469

⁶⁷ (1994) 6 SCC 241

educational institutions or for employment. This Court laid down guidelines for autonomy of CBI and other special investigating agencies in the case of **Vineet Narain and Others v Union of India and Another**.⁶⁸ In the case of **Vishaka and Others v State of Rajasthan and Others**,⁶⁹ this Court laid down guidelines to ensure prevention of sexual harassment of women at workplace. Another judgment in this regard is **Vishwa Jagriti Mission Through President v Central Govt. Through Cabinet Secretary and Others**,⁷⁰ where a two-judge bench of this Court laid down guidelines for educational institutes to prevent the menace of ragging.

111. This Court in the case of **Prakash Singh and Others v Union of India and Others**,⁷¹ after studying various committee reports on police reforms, laid down certain directions in the nature of police reforms to be operative until the new Police Act is to be framed. It is necessary to quote the following excerpt from the judgment:

“It is not possible or proper to leave this matter only with an expression of this hope and to await developments further. It is essential to lay down guidelines to be operative till the new legislation is enacted by the State Governments. Article 32 read with Article 142 of the Constitution empowers this Court to issue such directions, as may be necessary for doing complete justice in

⁶⁸ (1998) 1 SCC 226

⁶⁹ AIR 1997 SC 3011

⁷⁰ (2001) 6 SCC 577

⁷¹ (2006) 8 SCC 1

any cause or matter. All authorities are mandated by Article 144 to act in aid of the orders passed by this Court....In the discharge of our constitutional duties and obligations having regard to the aforementioned position, we issue the following directions to the Central Government, State Governments and Union Territories for compliance till framing of the appropriate legislations.”

112. This Court has also laid down guidelines to streamline and facilitate the institutional apparatus and procedural system. In the case of **Laxmi v Union of India and Others**,⁷² this Court intervened to prevent cases of acid violence, and laid down guidelines on sale of acid and the treatment of victims of acid attack. A three-judge bench decision in **Shakti Vahini v Union of India and Others**⁷³ issued guidelines to check unlawful interference by Khap panchayat in interfaith and inter caste marriages. The Court held:

“To meet the challenges of the agonising effect of honour crime, we think that there has to be preventive, remedial and punitive measures and, accordingly, we state the broad contours and the modalities with liberty to the executive and the police administration of the concerned States to add further measures to evolve a robust mechanism for the stated purposes.”

113. The series of case laws authoritatively demonstrate the commitment of this Court to intervene to preserve and promote the “Rule of Law”, by supplementing the legislative gaps till the

⁷² (2014) 4 SCC 427

⁷³ (2018) 7 SCC 192

Legislature steps in. This has been done in exercise of the plenary power of this Court under Article 142 of the Constitution.

114. Our decision is therefore to lay down parameters or guidelines for the selection process for the appointment of the Chief Election Commissioner and the Election Commissioner. This decision is supported by the two-judge judgment in ***State of Punjab v. Salil Sabhlok and Others***.⁷⁴ In this case, it was pointed out that no parameters or guidelines have been laid down in Article 316 of the Constitution for selecting the Chairperson of the Public Service Commission and no law has been enacted on the subject with reference to Schedule VII List II Entry 41 of the Constitution. In his concurring opinion, Justice Madan Lokur, for the bench, relied on ***Mohindhr Singh Gill*** case to reiterate that:

“... wide discretion is fraught with tyrannical potential even in high personages. Therefore, the jurisprudence of prudence demands a fairly high degree of circumspection in the selection and appointment to a constitutional position having important and significant ramifications.”

115. Justice Lokur also analysed the previous judgments of this Court on judicial review of the selection process, and noted:

⁷⁴ (2013) 5 SCC 1

“115. In *Centre for PIL* [*Centre for PIL v. Union of India*, (2011) 4 SCC 1 : (2011) 1 SCC (L&S) 609] this Court struck down the appointment of the Central Vigilance Commissioner while reaffirming the distinction between merit review pertaining to the eligibility or suitability of a selected candidate and judicial review pertaining to the recommendation-making process....Acknowledging this, this Court looked at the appointment of the Central Vigilance Commissioner not as a merit review of the integrity of the selected person, but as a judicial review of the recommendation-making process relating to the integrity of the institution. It was made clear that while the personal integrity of the candidate cannot be discounted, institutional integrity is the primary consideration to be kept in mind while recommending a candidate. It was observed that while this Court cannot sit in appeal over the opinion of HPC, it can certainly see whether relevant material and vital aspects having nexus with the objects of the Act are taken into account when a recommendation is made. This Court emphasised the overarching need to act for the good of the institution and in the public interest. Reference in this context was made to *N. Kannadasan* [*N. Kannadasan v. Ajoy Khose*, (2009) 7 SCC 1 : (2009) 3 SCC (Civ) 1].” (emphasis added)

116. It was also held that the selection process of a constitutional post cannot be equated with the selection process of a bureaucratic functionary. If the Executive is left with the exclusive discretion to select the candidate, it may destroy the fabric of the constitutional institution. This Court held:

“A constitutional position such as that of the Chairperson of a Public Service Commission cannot be equated with a purely administrative position—it would be rather facetious to do so. While the Chief Secretary and the Director General of Police are at the top of the ladder, yet they are essentially administrative functionaries. Their duties and responsibilities, however onerous, cannot be judged against the duties and responsibilities of an important constitutional authority or a constitutional trustee, whose very appointment is not only expected to inspire confidence in the aspirational Indian but also project the credibility of the institution to which he or she belongs. I am, therefore, unable to accept the

view that the suitability of an appointee to the post of Chairperson of a Public Service Commission should be evaluated on the same yardstick as the appointment of a senior administrative functionary... The Chairperson takes the oath of allegiance to India and to the Constitution of India—not an oath of allegiance to the Chief Minister. An appointment to that position cannot be taken lightly or on considerations other than the public interest. Consequently, it is not possible to accept the contention that the Chief Minister or the State Government is entitled to act only on the perceived suitability of the appointee, over everything else, while advising the Governor to appoint the Chairperson of the Public Service Commission. If such a view is accepted, it will destroy the very fabric of the Public Service Commission.” (para 119 and 125)

117. It was concluded that the Court can frame guidelines till the Legislature steps in. To quote:

“136. In the light of the various decisions of this Court adverted to above, the administrative and constitutional imperative can be met only if the Government frames guidelines or parameters for the appointment of the Chairperson and Members of the Punjab Public Service Commission. That it has failed to do so does not preclude this Court or any superior court from giving a direction to the State Government to conduct the necessary exercise within a specified period. Only because it is left to the State Legislature to consider the desirability or otherwise of specifying the qualifications or experience for the appointment of a person to the position of Chairperson or Member of the Punjab Public Service Commission, does not imply that this Court cannot direct the executive to frame guidelines and set the parameters. This Court can certainly issue appropriate directions in this regard, and in the light of the experience gained over the last several decades coupled with the views expressed by the Law Commission, the Second Administrative Reform Commission and the views expressed by this Court from time to time, it is imperative for good governance and better administration to issue directions to the executive to frame appropriate guidelines and parameters based on the indicators mentioned by this Court. These guidelines can and should be binding on the State of Punjab till the State Legislature exercises its power.” (emphasis added)

118. That Article 324(2) refers to the appointment of the Chief Election Commissioner and other Election Commissioners which shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President. It contemplates that the Parliament makes a law laying down the procedure of selection for appointment of the Chief Election Commissioner and other Election Commissioners, but such law has not been made by the Parliament, even after 73 years since the adoption of the Constitution. In order to fill the legislative vacuum, i.e. the absence of any law made by the Parliament for the appointment of members of the Election Commission and in the light of the views expressed in various reports of the Law Commission, Election Commission, etc., this Court is of the considered view that the instant case thus aptly calls for the exercise of the power of this Court under Article 142 to lay down guidelines to govern the process of selection and removal of Chief Election Commissioner and Election Commissioners, till the Legislature steps in.

X. Independence of Election Commissioners

119. In order to allow independence in the functioning of the Election Commission as a Constitutional body, the office of Chief Election

Commissioners as well as the Election Commissioners have to be insulated from the executive interference. This is envisaged under the proviso to Article 324(5) which reads:

“Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment:

Provided further that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.”

120. There are two procedural safeguards available regarding the removal of the CEC: (i) shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court; (ii) the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment. However, second proviso to Article 324(5) postulates that the removal of the Election Commissioners could be made only on the recommendation of the Chief Election Commissioner. The protection available to the Chief Election Commissioners is not available to other Election Commissioners. Various reports have recommended that the protection against removal available to the Chief Election Commissioner should be made available to the other

Election Commissioners to ensure the independence of the Election Commission.

121. A note titled “**Proposed Electoral Reforms**” (2004)⁷⁵ prepared and published by the Election Commission of India itself recommended that:

“In order to ensure the independence of the Election Commission and to keep it insulated from external pulls and pressures, Clause (5) of Article 324 of the Constitution, inter alia, provides that the Chief Election Commissioner shall not be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court. However, that Clause (5) of Article 324 does not provide similar protection to the Election Commissioners and it merely says that they cannot be removed from office except on the recommendation of the Chief Election Commissioner. The provision, in the opinion of the Election Commission, is inadequate and requires an amendment to provide the very same protection and safeguard in the matter of removability of Election Commissioners from office as is available to the Chief Election Commissioner.” (emphasis added)

122. The above recommendation was reiterated in the **Background Paper on Electoral Reform (2010)**⁷⁶ prepared by the Union Ministry of Law and Justice, in co-sponsorship of Election Commission of India states:

“Recommendation

⁷⁵ Election Commission of India Proposed Reforms (2004), Pg. 14, 15, available at: https://prsindia.org/files/bills_acts/bills_parliament/2008/bill200_20081202200_Election_Commission_Proposed_Electoral_Reforms.pdf

⁷⁶ Background Paper on Electoral Reform, Ministry of Law & Justice (2010), 6.3 Measures for Election Commission, pg. 19, Available at: https://lawmin.gov.in/sites/default/files/bgp_0.doc

Clause (5) of Article 324 of the Constitution, inter alia, provides that the Chief Election Commissioner shall not be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court. However, Clause (5) of Article 324 does not provide similar protection to the Election Commissioners and it only says that they cannot be removed from office except on the recommendation of the Chief Election Commissioner. The provision, in the opinion of the Election Commission, is inadequate and requires an amendment to provide the very same protection and safeguard in the matter of removability of Election Commissioners from office as is provided to the Chief Election Commissioner. The Election Commission recommends that constitutional protection be extended to all members of the Election Commission.

The Election Commission also recommends that the Secretariat of the Election Commission, consisting of officers and staff at various levels is also insulated from the interference of the Executive in the matter of their appointments, promotions, etc., and all such functions are exclusively vested in the Election Commission on the lines of the Secretariats of the Lok Sabha, and Rajya Sabha, Registries of the Supreme Court and High Courts etc.

The third recommendation of the Election Commission is that its budget be treated as “Charged” on the Consolidated Fund of India.”

(emphasis added)

123. The office of the Election Commission is an independent constitutional body which has been vested with the powers of superintendence, direction and control of the preparation of electoral rolls and the conduct of all parliamentary and State Legislatures’ elections and that of the office of President and Vice-President in terms of Article 324(1) of the Constitution. In terms of Article 324(2), the office of Election Commission comprises of Chief Election Commissioner and “*such number of other Election Commissioners, if any, as the President may from time to time fix*” and by an Order dated

01 October, 1993, the President has fixed the number of Election Commissioners to two until further orders. Since 1993, it is a multi-member Commission with equal participation in transacting the business of the Election Commission as provided under Chapter III of the Act, 1991 to ensure the smooth and effective functioning of the Election Commission.

124. Article 324(5) of the Constitution is intended to ensure the independence of the Election Commission free from all external political interference and, thus, expressly provides that the removal of the Chief Election Commission from office shall be in like manner as on the grounds as of a Judge of the Supreme Court. Nevertheless, a similar procedure has not been provided for other Election Commissioners under second proviso to Article 324(5) of the Constitution. The other conditions of the service of Chief Election Commissioner/other Election Commissioners have been protected by the Legislature by the Act 1991.

125. In the facts and circumstances, keeping in view the importance of maintaining the neutrality and independence of the office of the Election Commission to hold free and fair election which is a *sine qua non* for upholding the democracy as enshrined in our Constitution, it

becomes imperative to shield the appointment of Election Commissioners and to be insulated from the executive interference. It is the need of the hour and advisable, in my view, to extend the protection available to the Chief Election Commissioner under the first proviso to Article 324(5) to other Election Commissioners as well until any law is being framed by the Parliament.

XI. Directions

126. Until the Parliament makes a law in consonance with Article 324(2) of the Constitution, the following guidelines shall be in effect:

- (1) We declare that the appointment of the Chief Election Commissioner and the Election Commissioners shall be made on the recommendations made by a three-member Committee comprising of the Prime Minister, Leader of the 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.
- (2) It is desirable that the grounds of removal of the Election Commissioners shall be the same as that of the Chief Election

Commissioner that is on the like grounds as a Judge of the Supreme Court subject to the “recommendation of the Chief Election Commissioner” as provided under the second proviso to Article 324(5) of the Constitution of India.

(3) The conditions of service of the Election Commissioners shall not be varied to his disadvantage after appointment.

.....**J.**
(AJAY RASTOGI)

NEW DELHI;
MARCH 02, 2023