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# PRESERVING DEMOCRATIC INSTITUTIONS: EXAMINING EXECUTIVE INFLUENCE ON THE AUTONOMY OF THE ELECTION COMMISSION OF INDIA AND THE FOURTH BRANCH INSTITUTIONS

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*“Democracy is a part of the basic structure of the Constitution, free and fair election is the substratum of democracy. If there is no free and fair election, it is the end of democracy.”*

- MS Gill v. Chief Election Commissioner<sup>1</sup>

## ABSTRACT

With the 18<sup>th</sup> Lok Sabha elections just around the corner, a debate has been reignited on the *autonomy* and *constitutional stature* of the Election Commission of India. At the core of this debate is the crucial concern of *executive influence* on the Election Commission of India, which raises questions about its impartiality and status as the *fourth branch of government*. The article aims to critically analyse the core concerns arising from the shelving of the judicial and constitutional provisions recommended by the Hon’ble Supreme Court in framing *the Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service, and Term of Office) Act, 2023* (“*The CEC Act*”). The legislation framed by the executive has prompted discussions on the role, scope, autonomy, and effectiveness of the Election Commission of India in fulfilling its constitutional obligations. By employing a detailed *methodology* involving legal analysis and examination of various legislation, this study aims to assess the core issue of the primacy of the Election Commission of India as an ‘*autonomous fourth branch institution*’ and its broader implications for *public trust* in the *electoral process*. Contextualising the impact of the CEC Act, this study examines the aspect of *increased involvement of the executive branch* in the appointment process, tenure and service conditions of the main functionaries of the Election Commission of India. It highlights its impact on *decision-making dynamics, impartiality, and status as the fourth-branch government institution*. Furthermore, the article reviews the *historical evolution* of the

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<sup>1</sup> MS Gill v. Chief Election Commissioner, 1978 1 SCC 405

Election Commission's autonomy, emphasising instances where it played a pivotal role in upholding the democratic process.

**Keywords:** Autonomy, electoral process, fourth branch institutions, independence, judicial intervention, public interest litigation, public trust.

## Introduction

The elections to the 18<sup>th</sup> Lok Sabha are scheduled for 19 April 2024. Given the recent decision of the Hon'ble Supreme Court in *Anoop Baranwal v Union of India*, Writ Petition (Civil) No. 104 Of 2015; March 2, 2023 ("*Anoop Baranwal*") and the Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service, and Term of Office) Act, 2023 ("**The CEC Act**"), the issue concerning the appointment of Election Commissioners and the role of the Election Commission in conducting elections in the largest democracy of the world is at the forefront once again. In *Anoop Baranwal*, a five-judge constitution bench of the Hon'ble Supreme Court, with a view to maintain transparency, objectivity, and uphold the autonomy of the Election Commission of India ("**ECI**") held that the President of India must appoint the Election Commissioners on the advice of a committee including the Chief Justice of India. However, the decision has, in effect, been reversed by the Legislature by enacting the CEC Act, by which a Union Cabinet Minister replaced the Chief Justice of India. The CEC Act has been challenged before the Hon'ble Supreme Court of India and is pending consideration. The introduction of the CEC Act thus presents an opportunity to introspect on the larger issues, including *constitutional challenges leading to recurring pitfalls* like the unfavourable impact on public trust, failure of the rule of law and, above all, dilution of the electoral process in the largest democracy of the world, related to the ECI and reflect on plausible recommendations to offset the existing democratic limitations.

## Part 1 – A Prognosis Of Institutional Integrity And Fourth Branch Institutions

### i. Beacon of Public Trust<sup>2</sup>

The ECI is widely perceived as a responsible and trustworthy institution in India that holds the distinction of successfully organising elections involving complex logistics in the re-cycling of resources in a phased manner of elections in varied geographical areas. Given that the ECI

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<sup>2</sup> Manjari Katju, '*The Election Commission -autonomy in the crosshairs,*' 1 September 2023, available at <https://www.thefinancialworld.com/the-election-commission-autonomy-in-the-crosshairs/>

carries a heavy burden of upholding the trust of the Indian electorate, the ECI must be seen as a non-partisan institution unassociated with the purported biases concerning malpractices by political parties, like electoral speeches, alleged hateful propaganda, etc. However, over the years, questions have been raised over the institutional integrity of the ECI on account of its autonomy being influenced by the legislature. The latest reports on the autonomy of the ECI credible bodies like the V-Dem Institute<sup>3</sup> and the Gallup World Poll<sup>4</sup> indicate a declining trend in the trust and fairness of the conduct of elections.

## ii. The Constitutional Relevance of the Fourth Branch Institutions

In a classical modern democracy, there are three Wings of the state, viz, the legislature, the executive, and the judiciary. The framework of the constitution is designed to allocate power between these three wings and ensure adequate checks and balances between them. However, in a parliamentary system, it may be wishful to expect the ruling party with the majority votes to enforce constitutional norms by keeping National or democratic interests above its party interests. Considering this limitation of the constitutional framework, the requirement of fourth branch institutions were necessitated.<sup>4</sup> The function of the fourth branch is to ensure that the government departments perform their tasks with integrity and probity in the best public and national interest.<sup>5</sup>

These institutions need to be independent, especially from the political executive, as these institutions may, at times, be required to take measures as per the democratic norms, which may conflict with the interests of the ruling majority government of the day.<sup>6</sup> Given such a delicate constitutional position of these fourth-branch institutions, the only way that these institutions can function independently is by ensuring their separateness from the other three wings of the State, especially from the executive due to the natural tendency of assigning higher precedence to party interest by the majority government of the day, above the national or democratic interest. It has now been unanimously accepted that the fourth branch institutions, also called the *integrity institutions*, are required to ensure effective implementation of the

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<sup>3</sup> V-Dem Institute, Democracy Report 2024, available at <https://v-dem.net/>

<sup>4</sup> Gautam Bhatia, "Upholding the autonomy of the Election Commission", 21 December 2022, available at, <https://www.thehindu.com/opinion/lead/upholding-the-autonomy-of-the-election-commission/article66285945.ece>

<sup>5</sup> J J Spigelman, 'The Integrity Branch of Government', 2004, Pp 725, available at, <https://www.ombudsman.wa.gov.au/Publications/Documents/speeches/AIAL%202012%20Conference%20Paper%20Chris%20Field%20Final.pdf>

<sup>6</sup> *ibid*

basic rights and guarantees.

The aspect of this separation of the fourth branch institutions from the other three wings of the state is only mentioned in the Constitution. The Constitution also does not mention all the fourth-branch institutions nor provides their due composition to ensure their insulation from the other wings of the state. In the absence of such an arrangement in the Constitution, it becomes the judiciary's responsibility to recommend a suitable arrangement to the Executive and oversee its due implementation in the larger interest of the democratic norms.<sup>7</sup>

Similar is the case of deferral status of Article 324(2), which relates to the constitutional position of the ECI, especially the composition and mechanism of appointment of the commissioners.<sup>8</sup> An analysis of the challenges of independent status and executive influence on the ECI, when carried out in the backdrop of the deferral status of Article 324(2), will make the genesis and reason for the current imbroglio aptly crystal clear.

## **Part 2 – Analysis Of Recent Developments On The Appointment Of Election Commissioners In The Backdrop Of Fourth-Branch Institutions**

The current imbroglio involving the CEC Act has its genesis in the deferral status of Article 324(2). On the matter of the composition and appointment of the apex members of the ECI, the CEC Act lays down that the *ECI* shall consist of the Chief Election Commissioner (“CEC”) and other Election Commissioners (“EC”) (whose numbers is to be decided at the discretion of the President), and their appointment shall be made by the President, subject to the legislation of *any law* by Parliament.<sup>9</sup> In the *Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act 1991*, the Parliament set out the salary of the CEC and ECs at par with a Judge of the Supreme Court. However, it did not qualify their appointment process.<sup>10</sup>

In January 2015, a Public Interest Litigation challenging the procedure for appointment of the CEC and the ECs was filed before the Hon’ble Supreme Court in *Anoop Baranwal*. The PIL

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<sup>7</sup> Kartik Kalra, Conceptualizing the Fourth Branch as Co-Equal – On the Supreme Court’s Enforcement Directorate Judgement(s), 29 July 2023, available at <https://indconlawphil.wordpress.com/2023/07/29/guest-post-conceptualizing-the-fourth-branch-as-co-equal-on-the-supreme-courts-enforcement-directorate-judgements/>

<sup>8</sup> Anmol Jain, An Attack on Indian Democracy, 14 August 2023, Pp 3, available at <https://verfassungsblog.de/an-attack-on-indian-democracy/>

<sup>9</sup> The Constitution of India, 1950

<sup>10</sup> The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, 2023 (Bill No. LVII-C of 2023)

fulcrum on the failure of the Parliament to enact a law for the same as envisaged under the provisions of Article 324 (2). The challenge to the appointment process was on the premise that the appointment of the CEC and the ECs took place at the instance of the Executive alone, which was not only arbitrary but also incompatible with the values of transparency and objectivity in an electoral democracy.<sup>11</sup> In 2018, the Public Interest Litigation was referred to a five-judge Constitution bench to adjudicate the procedural aspects related to the appointment of the apex members of the ECI.<sup>12</sup>

Some of the arguments canvassed by the parties in this case are detailed below:

### **Petitioner**

1. A vacuum/ void is created since the Parliament has yet to enact a law as envisaged under the scheme of Article 124. The existence of the vacuum warrants intervention by courts to ensure free and fair elections, which are the fundamental tenants of democracy.<sup>13</sup>
2. Formulation of an independent appointment mechanism negates the purported prejudices of bias and favouritism.<sup>14</sup>
3. The committee's composition for the selection of the apex members of the ECI, as given in the CEC Act, suggests Executive influence and raises questions on the autonomous status of the ECI.<sup>15</sup>
4. Given that the ECI resolves disputes between the political parties, the sole participation of the Executive defeats the objective of the ECI being an independent body. The process involving the Executive alone was foul of the scheme of Article 14.<sup>16</sup>
5. The Court should constitute a committee to select 'suitable' candidates until the

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<sup>11</sup> *Anoop Baranwal v Union of India*, (2023) 6 SCC 161

<sup>12</sup> Order passed by the bench of two learned Judges in *Anoop Baranwal v Union of India*, (2023) 6 SCC 161

<sup>13</sup> *Union of India v. Association for Democratic Reforms* (2002) 5 SCC 294

<sup>14</sup> Submissions of Shri Gopal Sankaranarayanan, Learned Senior Counsel in *Anoop Baranwal v Union of India*, (2023) 6 SCC 161

<sup>15</sup> Submissions on behalf of Shri Prashant Bhushan, Learned Counsel on behalf of petitioner in *Anoop Baranwal v Union of India*, (2023) 6 SCC 161

<sup>16</sup> *Supreme Court Advocates-on-Record Association and Another vs. Union of India* (2016) 5 SCC 1

Parliament enacts a law. The Court must declare the qualifications of the candidates. Additionally, the expenditure of the ECI should be brought at par with the Supreme Court and other fourth-branch institutions, like the Union Public Service Commission and the Comptroller and Auditor General of India.<sup>17</sup>

6. Appointment of the ECs must be drawn from a broad spectrum, including the judiciary.<sup>18</sup>

### Respondent<sup>19</sup>

1. An attempt is being made to establish a vacuum that is inexistent.
2. The constitution of a committee by the Court would intervene in policy-making issues and would have an impact on the principle of '*Separation of Powers*' as stipulated in the Constitution.
3. The Constitution of India follows the Westminster model of Government. In such a model, the President acts on the recommendations of the Council of Ministers. Resultantly, under the provision of Article 324, for the last seven decades, the President has exercised the power to appoint the CEC and ECs based on the recommendations of the Council of Ministers.
4. The ECI is well-regulated, and any aspect of the appointment process is subject to judicial review.

In *Anoop Baranwal*, upon considering the submissions of the parties, the Hon'ble Supreme Court opined that the appointment of the CEC and ECs through the Executive was only a stop-gap measure until a law was made by the Parliament. Given the nature of politics in current times, including the use of 'big money',<sup>20</sup> it is imperative for the Court to lay down norms for appointing apex members of the ECI, which is considered a custodian of the fundamental rights of the electorate. The Constitutional bench of the Hon'ble Supreme Court held that the

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<sup>17</sup> Submissions of Shri Gopal Sankaranarayanan, Learned Senior Counsel in *Anoop Baranwal v Union of India*, 2023 6 SCC 161

<sup>18</sup> Submissions by Shri Jaya Thakur, Petitioner in Writ Petition (Civil) No. 998 Of 2022 in *Anoop Baranwal v Union of India* (2023) 6 SCC 161

<sup>19</sup> Submissions on behalf of Shri R. Venkataramani, the learned Attorney General for the Union of India in <sup>19</sup> *Anoop Baranwal v Union of India*, (2023) 6 SCC 161

<sup>20</sup> Ibid 11

President of India shall approve the appointment of the apex members of the ECI on the recommendation of the committee, which shall comprise the Prime Minister, the Leader of Opposition in the Lok Sabha (“LoP”) and the Chief Justice of India, till such time the Parliament enacts a law.

The significance of the judgment in *Anoop Baranwal* can be gauged from the following favourable outcomes<sup>21</sup>:

- i. **Level Playing Field and Broader Selection Process:** The committee for selection of the CEC and the ECs, comprising the Prime Minister, the LoP in the Lok Sabha (or leader of the largest Opposition Party), and the Chief Justice of India, allows a level playing field for the ruling and opposition parties.
- ii. **Elevation in the Constitutional Status of the Election Commission:** The Hon’ble Chief Justice of India is also on the selection committee, which facilitates the elevation of the constitutional status of the ECI.
- iii. **Mitigating Bias and Influence of the Executive:** The selection committee, involving the Hon’ble Chief Justice of India, eliminates executive influence in the selection process, extends a judicial perspective to appointments, and prevents the possibility of bias in favour of a particular political party.

Shortly after the Hon’ble Supreme Court pronounced the direction in *Anoop Baranwal*, the government introduced the CEC Bill, 2023<sup>22</sup>, passed by the Rajya Sabha on December 12, 2023, and the Lok Sabha on December 21, 2023. The bill received the Presidential assent on 28 December 2023.

The CEC Act<sup>23</sup> has legislated the process of appointing the apex members of the ECI, laying down the conditions of their service and qualifying their tenures of office. The Act replaced the Chief Justice of India with a Union Minister of the Cabinet in the selection committee. The selection committee will now comprise the Prime Minister, LoP in the Lok Sabha and a Union Minister of the Cabinet.<sup>24</sup> In effect, the CEC Act reinstates the original position related to

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<sup>21</sup> Ibid 2

<sup>22</sup> The Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, 2023 (Bill No. LVII-C of 2023)

<sup>23</sup> Ibid

<sup>24</sup> Ibid

Article 324(2), which was challenged in *Anoop Baranwal in the first place*. The CEC Act has given rise to the following concerns:

- i. **Level Playing Field:** The selection committee comprised stipulated in the CEC Act not only places the latter with a minority vote even before the process begins but also leaves the primary requirement of the independent status of the ECI unfulfilled.<sup>25</sup>
- ii. **Continued Executive Influence on the Election Commission:** The unmistakable imprint of Executive superiority in the selection committee leaves serious concerns about the autonomy of the ECI. This must be viewed seriously against the collective desires of the drafters of the Constitution.<sup>26</sup>

The validity of the CEC Act has been challenged on the premise that it has reversed the very essence of the PIL in *Anoop Baranwal and, most importantly, the direction of the Hon'ble Supreme Court in the said case.*

### Part 3 – Recommendations

- i. **Deferral Drafting:** This study proves that the deferral drafting technique has the potential of being unfavourably exploited unless due precautions are taken. These precautions should be incorporated in the form of necessary guidelines for future legislatures. Also, deferrals must, at the minimum, be drafted with detailed, time and situation-based guidelines.<sup>27</sup>
- ii. **The Assistance of Case Laws:** Over a period, many case laws have evolved upon which the arguments and strategy can be made to pursue similar cases on the matter of autonomy of the fourth branch institutions.<sup>28</sup>
- iii. **Precedence of the Judicial Route:** The Courts have achieved mainly the desired autonomy and functional freedom from the other wings of the state, especially the

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<sup>25</sup> Manjari Katju, The Election Commission -autonomy in the crosshairs, 01 September 2023, available at <https://www.thefinancialworld.com/the-election-commission-autonomy-in-the-crosshairs/>

<sup>26</sup> Ibid 11

<sup>27</sup> Anmol Jain, An Attack on Indian Democracy, 14 August 2023, Pp 3-4, available at <https://verfassungsblog.de/an-attack-on-indian-democracy/>

<sup>28</sup> Kartik Kalra, Conceptualizing the Fourth Branch as Co-Equal – On the Supreme Court's Enforcement Directorate Judgement(s), 29 July 2023, available at <https://indconlawphil.wordpress.com/2023/07/29/guest-post-conceptualizing-the-fourth-branch-as-co-equal-on-the-supreme-courts-enforcement-directorate-judgements/>

executive. The precedence of the judicial strategy and route could achieve the desired autonomous status for fourth-branch institutions.<sup>29</sup>

- iv. **Acknowledging Co-equal Character of Fourth Branch:** The Court needs to apply the same degree of sensitivity to the matter of autonomy to fourth-branch institutions as it applies to itself. The matter of autonomy of the fourth branch remains to be solved for more than seven decades, and it is high time that the Court adopts a comprehensive and cogent strategy.<sup>30</sup>
- v. **Learn from History:** The Dinesh Goswami Committee and Second Administrative Reforms Commission have made some historic and landmark recommendations that must be referred to for valuable and gainful insight into the transparent appointment process.<sup>31</sup>
- vi. **Involvement of Members of Judiciary:** Evidently, in the Indian context, the judiciary enjoys greater respect and is largely perceived to be partisan. The presence of a member of the judiciary in the selection committee is likely to be accepted by all stakeholders.<sup>32</sup>

## Conclusion

The ECI, though widely considered an independent institution, has often been subjected to domestic, public, and global scrutiny. This study emphasises the complex relationship between democratic integrity and executive influence in the functioning of the fourth-branch institutions. The impending Supreme Court judgment on the PIL challenging the CEC Act will shape the future course and trajectory of the ECI towards an independent status or otherwise. The impending developments in the appointment of the apex members of the Election Commission will have a long-term impact on its integrity and its functioning as a fourth-branch institution. As India prepares to go to voting to constitute its 18th Lok Sabha in less than a month, it will be interesting to see and analyse how the events unfold, especially considering the provisions of the CEC Act mooted by the Government.

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<sup>29</sup> Ibid 25

<sup>30</sup> Ibid 25

<sup>31</sup> Ibid 25

<sup>32</sup> Ibid 25