
A PARADIGM SHIFT: ANOOP BARANWAL V. UNION OF INDIA (2023) - REFORMING THE APPOINTMENT PROCESS OF ELECTION COMMISSIONERS IN INDIA

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The case of Anoop Baranwal v Union of India (2023) has paved a way for significant reforms in the appointment procedure of Election Commissioners in India. This case marked a critical moment in Indian Constitutional law as it worked to enhance the independence and integrity of the Election Commission of India, which is an important institution responsible for upholding the principle of democracy by conducting free and fair elections- the very independence that is promised by the constitution through its constituent assembly members.

Firstly, to understand the relevance and context of the Anoop Baranwal v Election Commission of India, we need to understand the background of what led to this case. The case of Anoop Baranwal v Union of India, arose from four writ petitions under Article 32¹ of the Constitution, which collectively challenged the procedure for the appointment of Election Commissioners and strove for reforms that ensured the impartial and independent aspect of the Election Commission. The main issue was around the interpretation of Article 324(2) of the institutions which lays down the governing principle of the appointment of Election Commissioners. Article 324(2)² reads as:

“(2) 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”

The first petition that was filed in 2015, raised questions of importance regarding the

¹ (No date) *Article 32 in the Constitution of India 1949 - indian kanoon*. Available at: <https://indiankanoon.org/doc/981147/> (Accessed: 10 October 2023).

² (No date a) *Article 324 in the Constitution of India 1949 - indian kanoon*. Available at: <https://indiankanoon.org/doc/950881/> (Accessed: 10 October 2023).

appointment process of the Election Commissioners. The contentions of petition were that the lack of a clear and independent selection process is resulted in arbitrary outcomes like appointment of bureaucrats, lacking transparent and objectivity. The petitioners argued that such as system rendered the Election Commission susceptible to influence of the Executive, which deprived the Election Commission of its independence. The constitutional framers while drafting this provision expected the parliament to enact a just and fair law to ensure the independence of the commission, however, that was not the case leading to a crucial institutional vacuum.

The second petition filed by Ashwin Kumar Updhyaya in 2017³ sought for equal protection to all Election Commissioners by ensuring that the removal process of Election Commissioner was done the same way as that of the Chief Election Commissioner which is similar to process of removal of a supreme court judge. This petition had also asked for an establishment of an independent for the Election Commission of India.

The third petition was filed by Association for Democratic reforms in 2019⁴, which challenged the executive's sole authority to appoint the Chief Election Commissioners and Election Commissioners as it would lead to arbitrariness, and contending that it was violative of both Article 324(2) and 14 of the Constitution⁵. The petitioners asked for the implementation of an independent appointment system consistent with various reports and recommendations on electoral reforms.

The Fourth Petition was filed in 2022 by Dr. Jaya Thakur⁶, that sought a writ of mandamus to establish a transparent appointment system of election commissioners.

Now coming to the case of Anoop Baranwal v Union of India. Anoop Baranwal contended that the members of the Election Commission of India should be chosen in a very free, transparent

³ Goyal, V. (2020) *Ashwini Kumar Upadhyay filed a PIL in the SC seeking directions to the government to implement the Law Commission of India's recommendations on strengthening laws against hate speech*, *Law Times Journal*. Available at: <https://lawtimesjournal.in/ashwini-kumar-upadhyay-filed-a-pil-in-the-sc-seeking-directions-to-the-government-to-implement-the-law-commission-of-indias-recommendations-on-strengthening-laws-against-hate-speech/> (Accessed: 10 October 2023).

⁴ *Judgment and petition: Association for Democratic reforms* (no date) *Judgment and Petition | Association for Democratic Reforms*. Available at: <https://www.adrindia.org/content/judgment-and-petition> (Accessed: 10 October 2023).

⁵ *Article 14 in the Constitution of India 1949 - indian kanoon*. Available at: <https://indiankanoon.org/doc/367586/> (Accessed: 10 October 2023).

⁶ *Writ petition (civil) no.456 of 2022; July 11, 2023 dr. jaya ... - livelaw*. Available at: https://www.livelaw.in/pdf_upload/518-dr-jaya-thakur-v-union-of-india-11-jul-2023-481508.pdf (Accessed: 10 October 2023).

and just which was not the case as the members of the Election Commission of India was only chosen by the President, on recommendation of the Prime minister and his council of ministers.

The judgement of the court lines up with the historical context of the constituent assembly debates which was highlighted by Justice Josph J. The constituent assembly debates unanimously emphasized the need for election machinery that was independent and free of any executive governmental control. The constituent assembly especially B.R Ambedkar had identified the risks associated with granting the sole appointment to the Prime Minister, as he realized that it could lead to the appointment of individuals with Partisan interests. Thus, he drafted an amendment which ultimately became Section 324 of the Constitution. This article was designed in a way that ensured independence of the Election Commission; however, it came with an expectation that the Parliament would always pass legislation to guarantee this independence. However, no such legislation was ever enacted.

Justice Joseph J in his judgement argues that Article 342(2) should be interpreted in accordance with the framers' intent. He declares that the constitution implicitly expects parliamentary action to protect the EC's independence. This interpretation underlines the Court's role in ensuring that the framer's intentions are upheld, even when the Parliament has lacked in doing so. This analysis of history starts from para 15 of Joseph J's judgement. He, from the constituent assembly debates conferred that "the election machinery should be outside the control of the executive government" (para 18) because they believed that if the power of appointment was solely left on the hands of the prime minister there is always a risk of the prime minister appointing a party man and furthermore, this very fear of executive power could be addressed by authoring Parliament to determine process of amendment.

The majority judgement also considers the famous judicial decisions which involved the T.N Seshan⁷ and the S.S Dhanao⁸ case where the main point of concern was the establishment of a free and independent Election Commission.

⁷ *T.N. Seshan v Union of India*, (1995) 4 SCC 611 - TruePrint™ Source: Supreme Court cases, © 2021 (no date) Studocu. Available at: <https://www.studocu.com/in/document/nalanda-open-university/taxation-law-and-accounts/tn-seshan-v-union-of-india-1995-4-scc-611/42632444> (Accessed: 10 October 2023).

⁸ (No date a) Bing. Available at:

<https://www.bing.com/search?q=ss%2Bdhanao%2Bv.%2Bunion%2Bof%2Bindia&q=SC&pq=ss%2Bdhanao&sc=5-9&cvid=5565189CF2ED4023BD1CF608D8C685C5&FORM=QBRE&sp=1&lq=0> (Accessed: 10 October 2023).

The structural argument in Justice Joseph J.'s judgement can be articulated in two parts: the nature of the right to vote and the role of the Election Commission. The judgment explores the historical debate surrounding the right to vote. Earlier judgments viewed the right to vote as a statutory right, but the 21st century witnessed a shift towards recognizing it as a fundamental right because it holds or enhances the very concept of democracy. Article 326, which guarantees elections based on universal suffrage, assumes a crucial role in grounding the right to vote within the Constitution.

The judgment acknowledges the central significance of the right to vote in a democracy and underscores that this right cannot be fully exercised without a robust institutional framework. The Election Commission assumes the responsibility of overseeing elections and ensuring the unimpeded and equitable exercise of the right to vote. It possesses powers that extend beyond the mere conduct of elections, including the allocation of party symbols, the de-recognition of parties, enforcement of the Model Code of Conduct, and the imposition of penalties on non-compliant parties.

The analysis of the judgement represents that the framers of the parliament intended the parliament to enact legislations to ensure the independence of the Election Commission specifically from Prime Ministerial appointments. However, the absence of such legislation from the parliament doubled with the authority of the Prime Minister to appoint the ECs and CEC through the Transaction of Business rule creates a situation where the independence of the Election Commission is severely at risk which in turn affects the constitutional right to vote and to have free and fair elections. The final aspect that prompts the Court's intervention pertains to its jurisdiction, which is triggered when the objective is to realize constitutional rights. The Court's intervention, in response, must address the existing gaps in the protection of independence. In other words, its role is to ensure the safeguarding of independence until Parliament fulfills the anticipated requirement of Article 324(2) by enacting relevant legislation. Thus, in summary (paragraphs 215 – 216):

“We have set down the legislative history of Article 324, which includes reference to what transpired, which, in turn, includes the views formed by the members of Sub-Committees, and Members of the Constituent Assembly. They unerringly point to one conclusion. The power of appointment of the Members of the Election Commission, which was charged with the highest duties and with nearly infinite powers, and what is more, to hold elections, not only to the

Central Legislature but to all the State Legislatures, was not to be lodged exclusively with the Executive. It is, accordingly that the words 'subject to any law to be made by Parliament' were, undoubtedly, incorporated.

The petitioner's argument emphasized that appointing members of the Election Commission of India (ECI) solely on the advice of the executive branch responsible for making laws could result in arbitrary decisions, thereby violating Article 14 of the Constitution. The petitioner cited precedents, including the Supreme Court's rulings in cases like *Vineet Narain v. Union of India*⁹ and *Vishaka v. State of Rajasthan*¹⁰, where guidelines were established for transparent appointments of the Chief Vigilance Commissioner and the Director of the Central Bureau of Investigation, as well as guidelines for addressing sexual harassment complaints.

Advocating for the separation of powers, the Union Government countered that the question of whether there exists a legislative gap that requires filling is a matter for parliamentary debate. They relied on previous judgments such as *Samsher Singh v. State of Punjab and Another*¹¹ and *T.N. Seshan, Chief Election Commissioner of India v. Union of India and others* to argue that Article 324(2) does not impose an obligation on Parliament to enact legislation and that the President possesses the authority to make appointments.

Furthermore, the Union contended that judicial intervention in these matters could encroach upon the delicate equilibrium of powers separation among the Legislature, the Executive, and the Judiciary. The Union Government asserted that these cases appeared to be driven by an idealistic vision rather than a demonstrable legislative vacuum.

Thus, the judgement was passed by the Supreme Court bench where it was decided i) A committee comprising the Prime Minister, Leader of Opposition in Parliament and Chief Justice of India will be created to make recommendations and advise the President on Election Commission appointments, until a separate law is enacted on this.

ii) The term and conditions of service of Election Commissioners and Regional Commissioners

⁹ *Vineet Narain & Others vs. Union of India & Another*, 1 SCC 226 (1997) *ESCR*. Available at: <https://www.escri-net.org/caselaw/2015/vineet-narain-others-vs-union-india-another-1-scc-226>

¹⁰ Varshney, H. (2019) *Vishakha vs. state of rajasthan - case summary*, *Law Times Journal*. Available at: <https://lawtimesjournal.in/vishakha-vs-state-of-rajasthan/> (Accessed: 10 October 2023).

¹¹ *Shamsher Singh & Anr vs State of Punjab on 23 August, 1974 - Indian kanoon*. Available at: <https://indiankanoon.org/doc/1382698/> (Accessed: 10 October 2023).

will be as stipulated by the rules, subject to any law passed by Parliament in the future.

iii) The Court observed that an independent permanent Secretariat is urgently needed for the Election Commission. The expenditure for such a Secretariat should be charged to the Consolidated Fund of India. (one of the contentions made by the petitioner)

The Supreme Court hence, appealed to the Union Government to consider bringing in necessary changes to ensure the true independence of the Election Commission, especially regarding its Secretariat.

Thus, as per my view, this case helps us underscore the pivotal role of the Election Commission in the democratic process, highlighting the profound impact of its decisions on the government, political parties, and the very essence of democracy itself. It stresses that waiting until after the election to challenge any misconduct by the Election Commission can result in numerous illegal and unfair outcomes, as once the election results are declared, it becomes challenging to rectify any irregularities.

Furthermore, we can acknowledge that the primary purpose of political parties is to attain power in order to govern the country in accordance with constitutional principles and laws. However, it raises concerns about the potential contamination of the electoral process with unfair practices, undermining the democratic ideals enshrined in the Constitution. It questions whether the pursuit of power should justify unethical means.

India requires a genuine democracy involves a profound transformation where citizens, equipped with fundamental rights, transition from being subjects ruled by an emperor to becoming a citizenry with rights and responsibilities. Without the independence of the Election Commission, the emergence of wealth disparities, media influence, and the dangers of unfair electoral practices will have a tendency of going unaddressed, posing a threat to citizen's rights.

Furthermore, the case helps us understand the critical importance of an Election Commission that is fiercely independent, honest, competent, and fair, as it is these qualities that are essential in upholding the rule of law, ensuring equality, and maintaining the integrity of the electoral process, all of which are fundamental principles of democracy. It highlights the adverse impact of the Election Commission's unfair or illegal exercise of powers on political parties and the overall democratic balance.

In conclusion, the case emphasizes the need for an objective and independent process for selecting Election Commissioners, distinct from executive control, to ensure that political parties are treated fairly and equally. It emphasizes that any action or omission by the Election Commission that treats political parties unfairly or arbitrarily, which could occur if the whole power of appointment is left at the hands of the Prime minister, as it would then lead to appointment of favourites that will help further the individual party policies whether or not those policies uphold or infringe the principles of democracy. This in turn violate the mandate of Article 14 of the Constitution

Therefore, the judgement of ensuring a committee comprising of the Prime Minister along with the Leader of the Opposition in the Parliament and the Chief Justice of India, ensures that the power of forming such an independent democratic institution isn't tampered with by the arbitrariness of the leading party or the executive. The addition of the Leader of the Opposition in the parliament (until any legislations was enacted by the Parliament to strengthen the democratic essence of the Election Commission) was thus, implemented to prevent this very concentration of power, to uphold the principle of Article 14 of the Constitution and to ensure the independence of democratic institution such as the Election Commission.