Anoop Baranwal vs Union Of India Ministry Of Law And ... on 2 March, 2023

Author: K.M. Joseph

Bench: K.M. Joseph, Ajay Rastogi, Aniruddha Bose, Hrishikesh Roy, C.T. Ravikumar

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

ANOOP BARANWAL

VERSUS

UNION OF INDIA

WITH

WRIT PETITION(CIVIL) NO. 1043 OF 2017
WRIT PETITION(CIVIL) NO.569 OF 2021

AND

WRIT PETITION(CIVIL) NO.998 OF 2022

JUDGMENT

K.M. JOSEPH, J.

I N D E X A. T H E C A S E S : T H E F O U R W R I T P E T I T I O N S ..... 3 B. THE SUBMISSIONS OF THE PETITIONERS; SHRI GOPAL SANKARANARAYANAN, LEARNED SENIOR COUNSEL IN WRIT PETITION (C) NO. 1043 OF 2017 ..... 7 C. SUBMISSIONS ON BEHALF OF SHRI PRASHANT BHUSHAN, LEARNED COUNSEL ON BEHALF OF PETITIONER IN WRIT PETITION (CIVIL) NO. 104 OF 2015. ..... 11 D. SUBMISSIONS BY SHRI JAYA THAKUR, PETITIONER IN WRIT PETITION (CIVIL) NO. 998 OF 2022 16 E. SUBMISSIONS OF SHRI KALEESWARAM RAJ, LEARNED COUNSEL FOR THE INTERVENOR in Writ Petition (Civil) No. 569 of 2021. ..... 17 F. SUBMISSIONS ON BEHALF OF THE LEARNED ATTORNEY GENERAL FOR THE UNION OF INDIA ... 18 G.

1. In this clutch of writ petitions maintained under Article 32 of the Constitution, the Court is called upon to consider the true effect of Article 324 and, in particular, Article 324(2) of the Constitution. The said sub-Article reads as follows:

> "324(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."

2. A Bench of two learned Judges of this Court in Writ Petition (Civil) No. 104 of 2015, passed the following Order on 23.10.2018:

> "I.A. No.2 for amendment of writ petition; raising additional facts, grounds and prayer is allowed.
>
> 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."

3. We may notice the following prayers in the said Writ Petition (Civil) No. 104 of 2015:

> "
>
> i) issue a writ of mandamus or an appropriate writ, order or direction, commanding the Respondent: to make law for ensuring a fair, just and transparent process of selection by constituting a neutral and independent collegium/ selection committee to recommend the name for the appointment of the member to the Election Commission under Article 324(2) of the Constitution of India;
>
> ii) issue a writ of mandamus or an appropriate writ, order or direction constituting an interim neutral and independent collegium/ selection committee to recommend the names for the appointment on the vacant post of the member to the Election Commission;
>
> iii) issue a writ of mandamus or an appropriate writ, order or direction

commanding the Respondent to decide the petition of the petitioner dated 03.12.2014 for making a law for ensuring a fair, just and transparent selection process by constituting an independent and neutral collegiums/ selection committee for recommending the names for members to the Election Commission;"

4. In Writ Petition (Civil) No. 1043 of 2017, filed by one Shri Ashwani Kumar Upadhyay, which is also a Public Interest Litigation, the reliefs sought are as follows:

"

a) direct the Central Government to take appropriate steps to provide same and similar protection to both the Election Commissioners so that they shall not be removed from their office except in like manner and on the like grounds as the Chief Election Commissioner;

b) direct the Central Government to take appropriate steps to provide independent secretariat to the Election Commission of India and declare its expenditure as charged on the consolidated. fund of India on the lines of the Lok Sabha / Rajya Sabha secretariat;

c) direct the Central Government to take appropriate steps to confer rule making authority on the Election Commission of India on the lines of the rule making authority vested in the Supreme Court of India to empower it to make election related rules and code of conduct;

d) take such other steps as this Hon'ble Court may deem fit for strengthening the office of the Election Commission of India and allow the cost of petition to petitioner."

5. In Writ Petition (Civil) No. 569 of 2021, filed by the Association for Democratic Reforms, the reliefs sought are as follows:

"i. Issue an appropriate writ, order or direction declaring the practice of appointment of Chief Election Commissioner and Election Commissioner solely by the executive as being violative of Articles 324(2) and 14 of the Constitution of India.

ii. Direct the Respondent to implement an independent system for appointment of members of the Election Commission on the lines of recommendation of Law Commission in its 255th report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; by the Dr. Dinesh Goswami Committee in its Report of May 1990; and by the Justice Tarkunde Committee in its Report of 1975.;"

6. In the latest and the last Writ Petition (Civil) No. 998 of 2022, Writ Petitioner is one Dr. Jaya Thakur. The relief sought is as follows:

> "(a). issue a writ order or directions in the nature of Mandamus to the Respondents to implement an independent and transparent system for appointment of members of the. election Commission on the lines, recommended by the Report of the Committee on Electoral Reforms of May 1990, formulated by the Ministry of Law and Justice, Government of India, the Report of Second Administrative Reforms Commission, Government of India of 2007 and the Report of Law Commission of India on Electoral Reforms of March 2015 and;"

7. Having referred to the broad complaint, the reliefs sought, we may appropriately notice the contentions of the parties.

B. THE SUBMISSIONS OF THE PETITIONERS; SHRI GOPAL SANKARANARAYANAN, LEARNED SENIOR COUNSEL IN WRIT PETITION (C) NO. 1043 OF 2017

8. In Writ Petition No. 1043 of 2017, Shri Gopal Sankaranarayanan makes the following submissions:

> There is a lacuna in the matter of appointment under Article 324. Of the twelve categories of unelected Constitutional Authorities, it is only the Election Commission and the National Commission for Scheduled Castes, where qualifications and eligibility are not laid down in the Constitution or the Statute.
>
> The words 'subject to law made' falls into two broad categories. In the matter of appointments, they are represented by Articles 324, 338, 338A and 338B. The other category relates to conditions of service.
>
> Representative of this group are Articles 146, 148, 229 and 243K. In the first category, Article 324 assumes critical importance. Shri Gopal Sankaranarayanan put forward the test that if a law could be made under Article 324, providing for a committee to select CECs and ECs and also for their qualifications, then, there is a void. If such a law cannot be made, then, there is no vacuum. Continuing with the argument about the presence of a vacuum, it is contended that the underlying rationale for the Court intervening must be the existence of a fundamental norm or a basic feature that needs to be secured. In this regard, democracy and the concomitant imperative to hold free and fair elections are projected. It is contended that the other aspect, which must be borne in mind, is to be not oblivious to the impact of the existence of the vacuum on the rights of the members of the public, both directly and indirectly. Like the Judiciary, the Election Commission must display fearless independence. In the absence of norms regarding the appointment, a central norm, viz., institutional integrity is adversely affected. An independent appointment mechanism would guarantee eschewing of even the prospect of bias. Favouritism

would be largely reduced. Right to Vote is a Constitutional Right. With reference to law prevailing in other South Asian countries and in the United Kingdom, it is contended that clear qualification, as also eligibility conditions, have been put in place. Mandatory tenures are made available. The removal process, which is uniform, is rigorous. It is contended that there has been a sudden change after 2001, in the matter of appointing Chief Election Commissioners. Successive Governments have decided to select increasingly older candidates. This has resulted in casting a shadow on the much-needed independence, apart from curtailing their tenure. Inaction on the part of the Election Commission even in the face of alarming increase of criminals in public life, must guide this Court. With reference to the Article, which we have adverted to, it is pointed out that the Election Commission has indulged in the alleged misconduct and favouritism. A vigorous appeal is made to the Court to listen to the constitutional silence and understand the dire need for the Court to step-in. In this regard, we are reminded that this Court has played a very proactive role in matters relating to elections and electoral reforms.

Interference was noteworthy in matters relating to affidavits on assets, criminal antecedents, time-bound election petition trials, special courts for criminal trials of M.P.s and M.L.A.s, protection from booth capturing, freebies and NOTA. The executive underreach justifies judicial oversight and activism, particularly when more than 72 years have gone by. It is contended that no mandamus is sought against Parliament or to implement the Gaikwad Law Commission Report. The following directions are pressed for until a law is made. A Committee of five, comprising the Prime Minister, the leader of the Opposition or of the single largest party in the Lok Sabha, the Chief Justice of India, the Speaker of the Lok Sabha and an eminent jurist selected by the first four to recommend suitable candidates, is to be appointed for appointment to the Election Commission. The petitioner would have the Court declare qualifications, which include citizenship of India, and that a person should have completed between 45 years and 61 years. The further qualifications are that the person should have impeccable integrity and high moral character. The individual must have never had affiliation either directly or indirectly to any political party. It is also prayed that the person appointed must have been a Member of the IAS or the IPS or a Judge of the High Court. In terms of the two provisos in Article 324(5), the Election Commissioners must be irremovable except after following the procedure in the first proviso. An independent Secretariat must be established. The expenditure of the Election Commission should be brought on par with those of the Supreme Court, the CAG and the UPSC. The expenditure must be made non-votable expenditure charged on the Consolidated Fund of India.

C. SUBMISSIONS ON BEHALF OF SHRI PRASHANT BHUSHAN, LEARNED COUNSEL ON BEHALF OF PETITIONER IN WRIT PETITION (CIVIL) NO. 104 OF 2015.

9. An independent Election Commission is necessary for a functioning democracy as it ensures Rule of Law and free and fair elections. The existing practice of appointment is incompatible with Article 324(2) and manifestly arbitrary. This is because Article 324(2) mandates that Parliament should make a just, fair and reasonable law. The provision for making a law was rested on the hope that in due course of time, the Government would exhibit initiative to make such a law and ensure independence and integrity of the Members of the Election Commission. It is contended that there is a vacuum. No power under the constitution can be exercised contrary to Part III of the Constitution, be it the Executive or the Legislative power. The Government of India (Transaction of Business) Rules, 1961 are silent regarding the process of selection and on the eligibility criteria. The convention invoked by the Union of India of appointments being made from Members of the Bureaucracy, is criticised as being not a healthy convention. It is for the reason that it is bereft of transparency, objectivity and neutrality. This system is inaccessible to public. The Executive alone being involved in the appointment, ensures that the Commission becomes and remains a partisan Body and a branch of the Executive. The independence of the Commission is intimately interlinked with the process of appointment. The concepts of power of reciprocity and loyalty to the appointing Body, referred to in Supreme Court Advocates-on-Record Association and Another vs. Union of India1, is invoked. With reference to developments said to have taken place recently, casting a shadow on the conduct of the Election Commission, the Report of Justice Madan B. Lokur is relied upon. Several instances of inaction or omission are pointed out. This is apart from various Commissions and Committees which have highlighted the need for a change. This Court has stepped-in on many occasions. It is further contended that the democracy is a facet of the basic structure of the Constitution. The appointment of Members of the Election Commission is being done on the whims and fancies of the Executive. The object of having an independent Election Commission is defeated. It is further contended that the Election Commission resolves various disputes between various political parties including the Ruling Government and other parties. This means that the Executive cannot be the sole participator. The practice falls foul of Article 14. Elaborate reference is made to the Constituent Assembly Debates. Elaborating on the powers 1 (2016) 5 SCC 1 of the Election Commission, it is pointed out that the power to register a political party under Section 29A of the Representative of the People Act, 1951, has come up for our consideration. The ruling of this Court in Indian National Congress v. Institute of Social Welfare and Others,2 that the Election Commission acts in a quasi-judicial capacity under Section 29A is relied upon. The Election Commission is clothed under Rules 6 and 8 of the Election Symbols (Reservation and Allotment) Order, 1968 to recognise political parties and allot symbols. Rule 15 of the said Order is pressed into service to highlight that Election Commission is empowered to take a decision with reference to splintered and rival groups arising within already recognized parties. There is power to withdraw and suspend recognition for breach of duty to follow the model code of conduct or the instructions of the Commission (See Rule 16A of the Symbol Order). It is blessed with the power to enforce the model code of conduct. The Election Commission can, in exercise of powers under Article 324(1), ban a candidate from 2 (2002) 5 SCC 685 campaigning. The Election Commission is also empowered to remove star campaigners. Reliance is placed on the various Reports, which we will advert to at a later stage. Still further, support is sought to be drawn from the Second Judges case in Supreme Court Advocates- on-Record Association and Others vs. Union of India,3 and the Judgment of this Court declaring the NJAC unconstitutional in Supreme Court Advocates-on-Record Association and Another vs. Union of India4. The learned Counsel also relies

upon the Judgment of this Court in Prakash Singh and Others vs. Union of India and Others,5 relating to reforms in the Police Administration. This is besides relying on Vineet Narain and Others vs. Union of India and Another,6 and the Third Judges Case in Special Reference No. 1 of 1998, Re7. It is contended that the Court may, apart from declaring appointment by the Executive of Members as unconstitutional, direct the constitution of a Committee to recommend the names for appointment on the basis of the Reports, including 3 (1993) 4 SCC 441 4 (2016) 5 SCC 1 5 (2006) 8 SCC 1 6 (1998) 1 SCC 226 (1998) 7 SCC 739 the recommendations of the Law Commission of India in its Two-Hundred and Fifty Fifth Report.

D. SUBMISSIONS BY SHRI JAYA THAKUR, PETITIONER IN WRIT PETITION (CIVIL) NO. 998 OF 2022

10. Shri Anup G. Choudary, learned Senior Counsel assisted by Virender K. Sharma, appeared on behalf of the petitioner. It is pointed out that there is ad- hocism flowing from the legislative vacuum. Regional Commissioners have never been appointed since 1951. The role of the Election Commission is such that in a modern election process, it can be abused by simply playing with the election schedule. The instrument of instructions which were sought even at the time of passage of amendments to the original Article can be filled in by judicial intervention. Appointment is reduced only to Bureaucrats, that too, majorly IAS Officers. The IAS Officers work in close alliance to their political masters. Appointment must be from a more broad-based pool of talent like Judicial Members. The Secretariat must have sufficient manpower. E. SUBMISSIONS OF SHRI KALEESWARAM RAJ, LEARNED COUNSEL FOR THE INTERVENOR in Writ Petition (Civil) No. 569 of 2021.

11. Shri Kaleeswaram Raj, learned Counsel for the intervenor in Writ Petition (Civil) No. 569 of 2021 would contend that the vacuum, which is projected must be conceded as a democratic space which the Founding Fathers of the Constitution, left open for the future Parliament to fill-up. It is contended that the Constituent Assembly not being an elected Body in the real sense, left many things to Parliament, which could claim better democratic legitimacy. Relying upon the Judges' cases, he would submit that a parallel may be drawn. It's a glaring instance of legislative inaction. Since denial of free and fair elections vitiates Fundamental Rights of the citizens, judicial intervention is highly necessary. The Right to Vote is now a part of the Fundamental Right. It is contended that, in fact, the Right to Vote is a Constitutional Right. He invites our attention to instances in other jurisdictions including from neighbouring countries like Sri Lanka.

F. SUBMISSIONS ON BEHALF OF THE LEARNED ATTORNEY GENERAL FOR THE UNION OF INDIA

12. The learned Attorney General, Shri R. Venkataramani, would address the following submissions:

> Accepting the petitioners' contention would involve nothing less than an amendment to the provisions of Article 324. The case of the petitioners is based on various Reports including that of the Central Law Commission. The premise of the petitioners' complaint is the failure of the extant mechanism and the reluctance or

failure of the Union of India to redress the complaint. A vacuum, which is not existent, is suggested as the very foundation of the petitioners claim. There is no such vacuum. The learned Attorney General would point out that introduction of the Collegium or Body of persons to select the Chief Election Commissioner or the Election Commissioner, would necessitate the Court, trampling upon the constitutional process of aid and advise of Ministers, contemplated under Article 74 of the Constitution of India. There cannot be merit in the contention that a tenure of six years must be inexorably guaranteed.

Judicial intervention in these matters would be at the expense of causing violence to the delicate separation of powers between the Legislature, the Executive and the Judiciary. The cases at hand appear to be supported with reference to an aspirational ideal as against any vacuum which is disclosed. A debatably better model of selection of the Commissioner cannot form the foundation for this Court to make a foray into the working of constitutional provisions. Article 324(2) contemplates clear procedure for appointment of a Chief Election Commissioner and the Election Commissioners.

Till a law is made, providing otherwise, the Founding Fathers have laid down that the appointment of the Chief Election Commissioner and other Election Commissioners shall be by the President. Indisputably, the Constitution of India follows the Westminster model of Government. The powers of the President, it is well-

settled, is to be exercised on the advice of the Council of Ministers. The President is only the formal Head of the State. The power under Article 324(2) was always understood to be exercised by the President, acting on the aid and advise of the Council of Ministers. Article 77 provides for the conduct of the business of the Government of India. Rules have been laid down thereunder. The learned Attorney General does not dispute that under the Rules, as laid down, the appointment of the Chief Election Commissioner and the Election Commissioners is a matter which need not engage the attention of the Council of Ministers. The Rules instead provide that it is the Prime Minister, who is empowered to decide upon the person to be appointed as the Chief Election Commissioner or the Election Commissioner. In other words, the President exercises the power under Article 324(2) and he proceeds to appoint a person as a Chief Election Commissioner or an Election Commissioner, acting on the advice of the Prime Minister. The contention is, it is this system, which has been in place for the last more than seven decades. There is no room for confusion. A long array of Chief Election Commissioners and the Election Commissioners have been appointed by resorting to the legitimate method contemplated under Article 324(2). It is further contended that there exists no identifiable wrong or trigger point to warrant any judicial interference. It is pointed out that elections have been held and voting rights ensured to millions of eligible voters. Nearly 68 per cent polling took place. The Election Commission of India, it is contended, has entered into various agreements under the auspices of the United Nations under which the Election Commission of India shares its expertise and lends its competent services for the

> conduct of elections in various other countries. This is not a case where the petitioners have been able to demonstrate that the independence of the Chief Election Commissioner or the Election Commissioner is under threat. The Election Commission is regulated in the discharge of its functions by law in every manner. The matters relating to the appointment of the Chief Election Commissioner and the Election Commissioner have been settled by the decision of this Court in T.N. Seshan, Chief Election Commissioner of India v. Union of India and others8. It is pointed out that the Election Commission (Conditions of Service of Election 8 (1995) 4 SCC 611 Commissioners and Transaction of Business) Act, 1991 (hereinafter referred to as, 'the 1991 Act) does not deal with the process of selection and all the details that may be connected to it. It is commended to the Court as a matter of fact that the Election Commissioners have been appointed from the high-ranking Members of the Civil Services since no Government so far has thought it fit to provide for any other source other than the Civil Services for making appointment and the Parliament has also not intervened. The system has worked well under Article 324(2). Any aberrations or illegalities in the matter of appointment or acts or omissions on the part of the appointees, lend themselves to the correctional jurisdiction of the superior courts under its powers of judicial review.

Section 4 of the 1991 Act does contemplate a six-year tenure for both the Election Commissioners' and the Chief Election Commissioner. Based on the observations made in T.N. Seshan (supra), Government has followed a sound practice of appointing Officers from the Civil Services. It is contended that those who are considered for appointment, must be "ripe" enough 'for being inducted into the Election Commission'. The six-year tenure is an ideal. However, strict adherence to the same would have introduced considerable problems. This being the position, the concept of a composite tenure has been arrived at. In other words, the separate term of six years, contemplated in Section 4 of the 1991 Act of six years each, has been understood as been practically attained with the incumbent being selected and appointed in such a manner that the person appointed as an Election Commissioner can look forward to an approximate tenure of six years, even though not as Election Commissioner but as an Election Commissioner and as a Chief Election Commissioner. There is a database of serving/retired Officers of the rank of Secretary to the Government of India/Chief Secretaries. The appointees are selected from the said database. The Minister of Law and Justice recommends a panel for the Prime Minister and the President from the database. Unless this Court considers non-adherence to Section 4 of the 1991 Act, as constituting a subversion of the independence of the Election Commission requiring redress thereof, this Court need not consider the 'aspirational propositions' as a principle to occupy an 'imagined vacuum'. The Reports relied upon by the petitioners are based on systems enshrined in other jurisdictions. It is significant that the Constituent Assembly, though conscious of other mechanisms, deliberately chose to adopt the method found in Article 324(2). There is no identifiable wrong. There is no continuing wrong either. The decisions, laying down principles, empowering this Court to lay down guidelines, are inapposite. The decisions were rendered by this Court in a situation where there clearly existed a vacuum. It is further pointed out that the Court was invited and persuaded to interfere, more importantly, when a Fundamental Right was found to exist or a right vouch-saved under an International Treaty. In the present batch of cases, there is no Fundamental Right involved, which

can support any interference by this Court. This is apart from Article 324(2) laying down a procedure, signalling the absence of any vacuum. The proof of the non- existence of the vacuum is sought to be established by the fact that several Chief Election Commissioners and Election Commissioners have been appointed according to need in the past. A perceived advancement in the method of appointment, based on the Reports, including the Law Commission of India, would scarcely furnish the foundation for doing violence to the provisions of the Constitution. We are reminded by the learned Attorney General that this Court is being invited to apply principles involved in the context of ordinary Statutes to the interpretation of the Constitution itself. The same is impermissible.

G. SUBMISSIONS OF SHRI TUSHAR MEHTA, LEARNED SOLICITOR GENERAL OF INDIA

13. Relying upon Article 53, which deals with the Executive power of the Union, it is contended that the law contemplated under Article 324(2) is the law contemplated under Article 53(3)(b). In the absence of such a law, the President has the constitutional power. The constitutional validity of Article 324 cannot be considered as it is a part of the original Constitution. The Constitution provides for a complete machinery to deal with the appointments to the Commission. The Vineet Narain Judgment was dealing with a lack of statutory enactment and not a constitutional provision. Any potential direction to include any non- Executive, would involve a violation of the Doctrine of Separation of Powers. Reliance is placed on the judgment of this Court in Samsher Singh v. State of Punjab and Another9. Article 324(2) cannot lead to a constitutional duty on the part of Parliament to legislate. Reliance is placed on T.N. Seshan (supra) to contend that the President is the appointing Authority and that the Chief Election Commissioner could not claim to be equated with Supreme Court Judges. The Doctrine of Separation of Powers is emphasised. Separation of powers, it is pointed out, is a reflection of democracy itself. The learned Solicitor General persuades the Court to exhibit judicial restraint. A causus omissus may not justify judicial interference. Matters relating to policy rightfully must remain immune from the judicial radar. What is involved in this case is essentially a political question.

9 (1974) 2 SCC 831 H. SUBMISSIONS OF SHRI BALBIR SINGH, LEARNED ADDITIONAL SOLICITOR GENERAL

14. Shri Balbir Singh forcefully contended that there is no vacuum and no trigger. Unlike the position obtaining in Vishakha, there is no dire need made out. The efficient working of the Election Commission unerringly points to independence, informing its functioning. Several elections have been conducted under its aegis. The Election Commission of India is recognised all over the world. A utopian model cannot be the premise for inserting guidelines, when the existing provisions are working well. The extent of neutrality and transparency invoked by the petitioners cannot be a sound basis for the Court to interfere.

ANALYSIS I. ‘THE FRAMING OF INDIA’S CONSTITUTION’ BY B. SHIVARAO

15. It is apposite that we understand the historical perspective including the debates in the Constituent Assembly. In the work, the ‘Framing of India’s Constitution’ by B. Shivarao, we find the

following narrative as regards the topic of Franchise and Elections.

"Election Commission In the Government of India Act, 1935, and in the earlier statues the conduct of elections was left to the executive – the Central or Provincial Governments, according as election to the Central or State Legislature was concerned. In the discussions in the Constituent Assembly, there emerged almost from the beginning a consensus of opinion that the right to vote should be treated as a fundamental right of the citizen and that, in order to enable him to exercise this right freely, an independent machinery to control elections should be set up, free from local pressures and political influences.

There was considerable discussion on these issues in the Fundamental Rights Sub-Committee and the Minorities Sub-Committee. K.M. Munshi's draft articles on fundamental rights included the following clause:

> Every citizen has the right to choose the Government and the legislators of the Union and his State on the footing of equality in accordance with the law of the Union or the unit, as the case may be, in free, secret and periodic elections.
>
> This clause was considered by the Fundamental Rights Sub-Committee at its meeting held on March 29, 1947. The sub-committee approved that (1) universal adult suffrage must be guaranteed by the Constitution;
>
> (2) elections should be free, secret and periodic; and (3) elections should be managed by an independent commission set up under Union law.

To give effect to these conclusions, the following recommendation was drafted for inclusion in the sub-committee's report:

> (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 of 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 of a 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.

There was some difference of opinion about vesting so much power in the Union in the matter of Election Commissions. It will be seen that, in terms of the recommendation made by the sub-committee, the appointment of all Election Commissions, irrespective of whether they were to function in relation to elections to the Legislature of the Union or in relation to elections to the Legislature of a unit was to be regulated by Union law. Some members of the sub-committee felt that it would be an infringement of the rights of the units if such over-riding authority was given to Union law in matters relating to elections to the Legislatures of the units. Nevertheless the recommendation as included in the draft was adopted by the sub-committee by a majority vote'.

The Minorities Sub-Committee considered these provisions at its meeting held on April 17, and accepted these recommendations. The only point that arose at the meeting of this Sub-Committee was raised by Syama Prasad Mukerjee, who thought that the minorities should be effectively represented in these Election Commissions. On the other hand Jairamdas Daulatram did not think it practicable to provide for separate representation for minorities. He suggested that the Election Commissions should be so constituted that they would function as impartial bodies and inspire confidence among all parties and communities. Accepting this suggestion, the Minorities Sub-Committee proposed in its report that Election Commissions should be independent and quasi-judicial in character.

The Advisory Committee on Fundamental Rights, Minorities, and Tribal and Excluded Areas considered this matter at its meetings of April 20 and 21. There was unanimous acceptance of the principles formulated by the Fundamental Rights Sub-Committee. Discussion centred mainly on the question whether the chapter on fundamental rights was the proper place for laying down these matters which pertained to electoral law. C. Rajagopalachari was of the view that franchise would not ordinarily be a part of fundamental rights; and P.R. Thakur pointed out that the proposal not only made adult franchise compulsory, but also provided for direct elections, thereby prejudging the issue of direct elections; he expressed the view that the Advisory Committee, dealing as it did with fundamental rights, could not appropriate the jurisdiction to decide on this issue. Ambedkar, on the other hand, was clearly and emphatically of the opinion that adult franchise and all provision for its free and fair exercise should be recognized as in the nature of fundamental rights. He said:

> 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 that we have guaranteed in this fundamental right is that the elections shall be free and the elections shall be by secret voting ... We have not said that they shall be direct or they shall be indirect. This is a matter that may be considered at another stage ...
>
> The third proposition which this fundamental clause enunciates is that in order that elections may be free in the real sense of the world, 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. We have also given permission in sub-clause (3) of this clause that each unit may appoint its own Commission. The only thing is that the law shall be made by the Union. The reason for this is that later on there will be a clause in the Constitution which will impose an

obligation upon the Union Government to protect the Constitution framed by themselves for the units. Therefore we suggested that the Union should have the power of making a law, although the administration of that law may be left to the different units.

There was unanimous support for the principles enunciated by Ambedkar but Rajagopalachari argued that it would not be proper to deal with this issue as a fundamental right. It could not be taken for granted, he said, that the Union Legislature would be elected by the direct vote of all citizens from all India. He therefore suggested that these matters relating to franchise should be dealt with when they arose in connection with the Constitution and not be prejudged as fundamental rights. Eventually a compromise solution suggested by Govind Ballabh Pant was adopted, and it was decided that these recommendations need not go as part of the clauses on fundamental rights; but that in the letter forwarding the report of the Advisory Committee the Chairman should make it clear that the committee recommended the adoption of these proposals.

In accordance with this decision the Advisory Committee recommended that, instead of being included in the chapter of fundamental rights, the provision regarding the setting up of an independent Election Commission, along with the other two proposals regarding adult franchise and free and fair elections to be held periodically, should find a place in some other part of the Constitution.

In his memorandum on the principles of a model Provincial Constitution circulated on May 30, 1947, B.N. Rau, the Constitutional Adviser, included a provision that the superintendence, direction and control of elections, including the appointment of election tribunals, should be vested in the Governor acting in his discretion, subject to the approval of the Council of State. Likewise, in the memorandum on the Union Constitution, circulated on the same date, he included a similarly comprehensive provision that the control of central elections, including the appointment of election tribunals, should be vested in the President acting in his discretion; the intention of this provision was to make available to the President the advice of the Council of State.

The Provincial Constitution Committee in its report of June 27, 1947, accepted the suggestions in the Constitutional Adviser's memorandum but deleted the reference to the approval of the Council of State. The Union Constitution Committee deleted all the suggestions for the exercise of discretionary powers by the President and also the proposal for a Council of State. The committee however took a definite step in the direction of a centralized authority in the matter of elections: according to its recommendations, all powers of supervision, direction and control in respect of the federal as well as provincial elections would be vested in a Commission to be appointed by the President. The Union Powers Committee expanded this proposal by the inclusion in the Federal Legislative List of the subject "All Federal elections: and

> Election Commission to superintend, direct and control all Federal and Provincial elections".
>
> The provisions suggested in the model Provincial Constitution came up for discussion in the Constituent Assembly on July 18, 1947. The Constitutional Adviser in his Draft Constitution of October, 1947 provided that the superintendence, direction and control of all elections to the Federal parliament and Provincial Legislatures (including the appointment of Election Tribunals for the decision of doubts and disputes in connection with elections to Parliament and to Provincial Legislatures) and of all elections to the offices of President, Vice-President, Governor and President. The Drafting Committee altered this scheme and in its draft the power of appointing an Election Commission for supervising elections to the office of Governor and to the State Legislature was vested in the Governor. The Drafting Committee expressed the definite opinion that the Election Commission for provincial elections should be appointed by the Governor. This view underwent a radical change subsequently and on June 15, 1947, when the article came up for discussion in the Constituent Assembly, Ambedkar introduced a new article which made comprehensive provision for a Central Election Commission to be in charge of all Central and State elections." J. THE CONSTITUENT ASSEMBLY DEBATES
>
> 16. Draft Article 289 went on to blossom into Article 324 of the Constitution. Regarding the Draft Article 289 it is apposite that we notice the following developments and discussions. On 15th June, 1949, the following discussions are noticed. Amendment No.99 was moved by Dr. B.R. Ambedkar to the original Article 289.

The original Article 289 read as follows:

> "289. The superintendence, directions and control of elections to be vested in an Election Commission.
>
> (1) 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, including the appointment of election tribunals for the decision of doubts and disputes arising out of or in connection with elections to Parliament and to the Legislatures of States shall be vested in a Commission (referred to in his Constitution as the Election Commission) to be appointed by the President.

(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 appoint, and when any other Election Commissioner is so appointed, the Chief Election Commissioner shall act as the Chairman of the Commission. (3) Before each general election to the House of the People and to the

Legislative Assembly of each State and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President shall also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the election Commission in the performance of the functions conferred on it by clause (1) of this article.

(4) 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 the office except in like manner and on the like grounds as a judge of the Supreme Court and the conditions of the 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.

(5) The President or the Governor or Ruler 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 by clause (1) of this article."

17. The amendment moved contemplated substitution of the original Article 289 inter alia as follows:

> "(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 appoint, and when any other Election Commissioner is so appointed, the Chief Election Commissioner shall act as the Chairman of the Commission.
>
> Xxx xxx xxx (4) 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 the office except in like manner and on the like grounds as a judge of the Supreme Court and the conditions of the 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."

18. Dr. B.R. Ambedkar had this to state inter alia:

> "The House will remember that in a very early stage in the proceedings of the Constituent Assembly, a Committee was appointed to deal with what are called

Fundamental Rights. That Committee made a report that it should be recognised that the independence of the elections and the avoidance of any interference by the executive in the elections to the Legislature should be regarded as a fundamental right and provided for in the chapter dealing with Fundamental Rights. When the matter came up before the House, it was the wish of the House that while there was no objection to regard this matter as of fundamental importance, it should be provided for in some other part of the Constitution and not in the Chapter dealing with Fundamental Rights. But 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. In pursuance of the decision of the House, the Drafting Committee removed this question from the category of Fundamental Rights and put it in a separate part containing articles 289, 290 and so on. 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).

Sub-clause (2) says that there shall be a Chief Election Commissioner and such other Election Commissioners as the President may, from time to time appoint. There were two alternatives before the Drafting Committee, namely, either to have a permanent body consisting of four or five members of the Election Commission who would continue in office throughout without any break, or to permit the President to have an ad hoc body appointed at the time when there is an election on the anvil. The Committee, has steered a middle course. 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. Election 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 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.

Now, Sir, the original proposal under article 289 was that there should be one Commission to deal with the elections to the Central Legislature, both the Upper and the Lower House, and that there should be a separate Election Commission for each

> province and each State, to be appointed by the Governor or the Ruler of the State. Comparing that with the present article 289, there is undoubtedly, a radical change. This article proposes to centralize the election machinery in the hands of a single Commission to be assisted by regional Commissioners, not working under the provincial Government, but working under the superintendence and control of the central Election Commission. As I said, this is undoubtedly a radical change. But, this change has become necessary because today we find that in some of the provinces of India, the population is a mixture..." (Emphasis supplied)

19. Professor Shibban Lal Saksena gave notice of an amendment to the amendment to Article 289 which, inter alia, stated that after the word 'appoint' in clause (2), the words "subject to confirmation by two-third majority in a joint session of both the Houses of Parliament" be inserted. He also proposed that in clause (4), the words "Parliament may by law determine" be substituted for the words "President may by rule determine". There were certain other amendments proposed by Prof. Saksena. Prof. Saksena further went on to make the following statement:

> "..Of course it shall be completely independent of the provincial Executives but 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..." Xxx xxx xxx "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. If it is only a bare majority, then the party in power could vote confidence in him but when I want 2/3rd majority it means that the other parties must also concur in the appointment so that in order that real independence of the Commission may be guaranteed, in order that everyone even in opposition may not have anything to say against the Commission, the appointments of the Commissioners and the Chief Election Commissioner must be by the President but the names proposed by him should be such as command the confidence of two-thirds majority of both the Houses of Legislatures." xxx xxx xxx "I want that in future, no Prime Minister may abuse this right, and for this I want to provide that there should be two-thirds majority which should approve the nomination by the President. Of course there is danger where one party is in a huge majority. As I said just now it is quite possible that if our Prime Minister wants, he can have a man of his own party, but I am sure he will not do it. 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. Because we are in a majority we can have anything passed only theoretically. So the need for confirmation will invariably ensure a proper choice." (Emphasis Supplied)

20. On 16th June 1949, we notice that Shri H.V. Pataskar stated as follows:

> "As I said, so far as I can see, article 289(2) is quite enough for the purpose. Even under article 289(2) we can appoint not merely some officials of the Government as Election Commissioners, but people of the position of High Court Judges; we can make them permanent; we can make them as Independent as we are trying to make them in the case of the Central Commission." (Emphasis Supplied)

21. Pandit Hirday Nath Kunzru addressed the following concerns and suggested as follows:

> "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 impartially 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 Commissioners 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. (Interruption). Somebody asked me suitable why it should be so." xxx xxx xxx "My remedy for the defects that I have pointed out is that Parliament should be authorised to make provision for these matters by law. Again, Sir, this article does not lay down the qualifications of persons who are chosen as Chief Election Commissioners or as Election Commissioners. And, as I have already pointed out, in the matter of removal, the Election Commissioners are not on the same footing as the Chief Election Commissioner." (Emphasis Supplied)

22. Shri K.M. Munshi expressed the following views:

> "Between two elections, normally there would be a period of five years. We cannot have an Election Commission sitting all the time during those five years doing nothing. The Chief Election Commissioner will continue to be a whole-time officer performing the duties of his office and looking after the work from day to day, but when major elections take place in the country, either Provincial or Central, the Commission must be enlarged to cope with the work. More members therefore have to be added to the Commission. They are no doubt to be appointed by the President, but as the House will find, they are to be appointed from time to time. Once they are appointed for a particular period they are not removable at the will of the President. Therefore, to that extent their independence is ensured. So there is no reason to

believe that these temporary Election Commissioners will not have the necessary measure of independence. Any way the Chief Election Commissioner an independent officer, will be the Chairman and being a permanent officer will have naturally directing and supervising power over the whole Commission. Therefore, it is not correct to say that independence of the Commission is taken away to any extent.

We must remember one thing, that after all an election department is not like a judiciary, a quasi-independent organ of Government. It is the duty and the function of the Government of the day to hold the elections. The huge electorates which we are putting up now, the voting list which will run into several crores— all these must necessarily require a large army of election officers, of clerks, of persons to control the booths and all the rest of them. Now all this army cannot be set up as a machinery independent of Government. It can only be provided by the Central Government, by the Provincial Government or by the local authorities as now. It is not possible nor advisable to have a kingdom within a kingdom, so that the election matters could be left to an entirely independent organ of the Government. A machinery, so independent, cannot be allowed to sit as a kind of Super- Government to decide which Government shall come into power. There will be great political danger if the Election Tribunal becomes such a political power in the country. Not only it should preserve its independence, but it must retain impartiality. Therefore, the Election Commission must remain to a large extent an ally of the Government; not only that, but it must, a considerable extent, be subsidiary to Government except in regard to the discharge of the functions allotted to it by law.

"Therefore, the Parliament as well as the State Legislatures are free to make all provisions with regard to election, subject, of course, to this particular amendment, namely, the superintendence, direction and control of the Election tribunal. Today, for instance, the elections re controlled by officers appointed either by the Center or the Provinces as the case may be. What is now intended is that they should not be subjected to the day-to-day influence of the Government nor should they be completely independent of Government, and therefore a sort of compromise has been made between the two positions; but I agree with my honourable Friend, Pandit Kunzru that for the sake of clarity, at any rate, to allay any doubts clause (2) requires a little amendment. At the beginning of clause (2) the following words may be added; "subject to the provisions of law made in this behalf by Parliament." (Emphasis Supplied)

23. Dr. B.R. Ambedkar made the following remarks:

"Now 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. I do want to confess that this is a very important question and it has given me a great deal of headache and I have no doubt about it that it is going to give this House a great deal of headache. In the U.S.A. they have solved this question by the provision contained in article 2 Section (2) of their Constitution whereby certain appointments which are specified in Section (2) of article 2 cannot be made by the President without the concurrence of the Senate; so that so far as the power of appointment is concerned, although it is vested in the President it is subject to a check by the Senate so that the Senate may, at the time when any particular name is proposed, make enquiries and satisfy itself that the person proposed is a proper person. But it must also be realised that that is a very dilatory process, a very difficult process. Parliament may not be meeting at the time when the appointment is made and the appointment must be made at once without waiting. Secondly, the American practice is likely and in fact does introduce political considerations in the making of appointments. Consequently, while I think that the provisions contained in the American Constitution is a very salutary check upon the extravagance of the President in making his appointments, it is likely to create administrative difficulties and I am therefore hesitating whether I should at a later stage recommend the adoption of the American provisions in our Constitution. 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 from the American Constitution may be obviated and the advantage which is contained therein may be secured. At this stage it is impossible for me to see or anticipate what attitude this House will take when the particular draft Instructions come before the House. If the House rejects the proposal of the Drafting Committee that there should be an Instrument of Instructions to the President which might include, among other things, a provision with regard to the making of appointments, this problem would then be solved by that method. But, as I said, it is quite difficult for me to anticipate what may happen. Therefore in order to meet the criticism of my honourable Friend Professor Saksena, supported by the criticism of my honourable Friend Pandit Kunzru, I am prepared to make certain amendments in amendment No. 99. I am sorry I did not have time to circulate these amendments, but when I read them the House will know what I am proposing." (Emphasis Supplied)

24. Thereafter, he proposed that an amendment which read as follows:

"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." (Emphasis Supplied)

25. We notice that the amendment which was proposed by Professor Shibban Lal Saksena which we have noticed came to be negatived and the amendment which was proposed by Dr. B.R. Ambedkar was adopted. Thus, Article 289 as amended was added to the Constitution. It is this Article which appears in the Constitution as Article 324.

26. At this stage, we may only notice the following comment, however, in the work by B Shiva Rao: -

> "By leaving a great deal of power in hands of the President, it gave room for the exercise of political influence by the Central Government in the appointment of the Chief Election Commissioner and the other Election Commissioners. His remedy was that Parliament should be authorized to make provision for these matters by law. K.M. Munshi, while supporting Ambedkar's proposal suggested in order to meet Kunzru's criticism an amendment requiring that the appointment of the Chief Election Commissioner and the other Election Commissioners would be subject to law made by Parliament; and that the power of the President to make rules regulating their conditions of service would likewise be subject to any law made by Parliament. With these modifications the article was adopted: at the revision stage it was numbered as article 324."

27. The Constituent Assembly of India can proximately be traced to the deliberations of the cabinet mission. The broad features were as follows. The members of the constituent assembly were to be elected not on the basis of adult suffrage. At the time, i.e., in 1946, India was still under British rule. British India broadly consisted of the Governors provinces and the Chief Commissioner's provinces. There were also a large number of princely states. An interim government, no doubt, based on elections, was put in place. There were also at the same time, provincial legislative bodies. The members of the Constituent Assembly came to be elected by the members of the provincial assemblies and they were not directly elected by the people of the country as such. Shri Kaleeswaram Raj is, therefore, correct that the Constituent Assembly was not directly elected by the people. There were changes which were necessitated by the partition. Suffice it to note that there were 238 members representing the Governors and others provinces. This is besides 89 sent by the princely states. The first meeting of the Assembly was held on 9th December, 1946. One Shri B.N. Rau was appointed as the constitutional advisor. He made a draft constitution. A drafting committee, drawn from the members of the constituent assembly in turn with the help of the Secretariat as well, brought out two drafts further, which in turn, were published. Public discussion ensued. Thereafter, the draft articles were discussed in the constituent assembly. There were further amendments. It is to be noticed also that the humongous task necessarily led to the creation of several committees. The most prominent of them can be perceived as the drafting committee, the advisory committee and various sub-committees which included the sub-committee on fundamental rights.

K. THE USE OF CONSTITUENT ASSEMBLY DEBATES

28. In regard to the use of Constituent Assembly debates, the law has not stood still. At any rate, whatever may be the controversy, as regards its employment to discern, the purport of a provision

there can be no taboo involved in its use to understand the history of a provision under the Constitution and the various steps leading up to and accompanying its enactment. In this regard, we may refer to the following view expressed in His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Another10:

> "1598. If the debates in the Constituent Assembly can be looked into to understand the legislative history of a provision of the Constitution including its derivation, that is, the various steps leading up to and attending its enactment, to ascertain the intention of the makers of the Constitution, it is difficult to see why the debates are inadmissible to throw light on the purpose and general intent of the provision. After all, legislative history only tends to reveal the legislative purpose in enacting the provision and thereby sheds light upon legislative intent. It would be drawing an invisible distinction if resort to debates is permitted simply to show the legislative history and the same is not allowed to show the legislative intent ..." (Emphasis supplied)

29. In fact, in a recent Judgment by Justice Ashok Bhushan, which is partly concurring and partly dissenting, reported in Dr. Jaishri Laxmanrao Patil v.

(1973) 4 SCC 225 Chief Minister and others11, has approved, after referring to the decisions of this Court on the point, 'the use of Constituent Assembly debates'. L. CONCLUSIONS ABOUT HISTORICAL PERSPECTIVES INCLUDING THE LIGHT SHED BY THE CONSTITUENT ASSEMBLY DEBATES

30. The members of the Constituent Assembly were undoubtedly concerned over the need to ensure independence of the Election Commission. Under the Government of India Act, 1935, the earlier law, it was the Executive which was conferred the power to conduct the election. Initially, there was a consensus of opinion, in fact, that the right to vote was to be made a fundamental right. In fact, in the draft Article by Shri K.M. Munshi, he contemplated providing for right to choose for every citizen and a free secret and periodic election. The Fundamental Rights Sub- Committee also approved that there must be universal adult franchise guaranteed by the Constitution. The election was to be free, secret and periodic. Most importantly, the Fundamental Rights Sub-Committee in (2021) 8 SCC 1 the meeting held on 29.03.1947 contemplated that an independent Commission must be set up under Union law. A recommendation providing for an Election Commission being appointed in all cases with the law of the Union was made. Further, it becomes clear from a perusal of the work 'Framing of India's Constitution' by B. Shiva Rao that some disputes arose relating to so much power being conferred on the Union in the matter of elections. The dispute essentially related to clothing the Commission with power to conduct elections in regard to the State Legislatures, besides the Union Legislature. The Minority Sub-Committee also made a report that the Election Commission should be independent and quasi-judicial in character. The Advisory Committee on Fundamental Rights, Minority, Tribal and Excluded Area also accepted the principles formulated by the Fundamental Rights Sub-Committee. However, the view was expressed by Shri C. Rajagopalachari that the right to vote should not be a part of fundamental right. Dr. Ambedkar, however, specifically opined that in order that election 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 be conducted by the independent body called the Election Commission. Shri C. Rajagopalachari, however, persevered with the theme that the matter relating to franchise may not find itself among the provisions providing for Fundamental Rights. Shri Govind Vallabh Pant suggested a compromise and the Advisory Committee thereby recommended that instead of being included in the Chapter on Fundamental Rights, the provisions relating to franchise and to an independent Election Commission should be located in another part of the Constitution. In his work, the Framing of India's Constitution, by B. Shivarao has not minced words by commenting that by leaving a great deal of power in the hands of the President, it gave room for exercising political influence in the appointment of the Election Commissioner and other election commissioners. The remedy, it was found, which was contemplated was, that the Parliament would make a law to regulate the matter. As we have noticed, there was severe criticism, particularly by Shri Kunzuru and Professor Shiben Lal Saxena, and it was thereupon, that Shri K.M. Munshi while supporting Ambedkar's amendment to the original article, recommended that the appointment be subject to the law made by the Parliament. It is on this fundamental basis that the amendment which was proposed by Dr. Ambedkar to the original article was adopted.

31. Professor Saxena was emphatic that the draft amended Article 289, which contemplated appointment being made by the President, without anything more, would necessarily mean that the Prime Minister would end up appointing the Commission. He warned that it would not ensure their independence. He was clear that in future, no Prime Minister should abuse the right to appoint. Shri H.V. Pataskar felt Article 289(2) sufficed. The thought which comforted the Member was not merely some official of the Government could be appointed as Election Commissioners but people in the position of High Court Judges. Pandit Hirday Nath Kunzru clearly articulated the anxiety and the need for the preparation of the electoral roll and the conduct of the elections, being entrusted to people, who were free from political bias and whose impartiality could be relied upon 'in all circumstances'. The plight of the President, who has to act on the advice of the Prime Minister, was highlighted. It was the learned Member, who suggested the remedy for the defect, that is that the Parliament should be authorised to make provisions for these matters, by law. This was also the view of the Sub-Committee on Fundamental Rights. Shri K. M. Munshi, took the view that the Election Commission must remain to a large extent an ally of the Government. The pursuit of independence of the Election Commission, he felt, should not result in there arising 'a kingdom within a kingdom'. It was not to be a quasi- independent organ of the Government. This is on the basis that the Election Commission would necessarily have to rely upon Officers, who would have to be provided by the Government. Finally, we find Dr. Ambedkar acknowledging the existence of a great deal of merit in the fear that guaranteeing a fixed and secured tenure, was of no use, if there was no provision in the Constitution, which would stand in the way of either an incompetent or unfair official, becoming and running the Election Commission. In particular, Dr. Ambedkar foresaw the danger of the Election Commissioners, being persons who were likely to be under the control of the Executive. The provision, as proposed to be amended by Dr. Ambedkar, it was admitted by Dr. Ambedkar himself, did not provide against an 'unfit' person being appointed to the Election Commission. Thereafter, he predicted that the question will emerge as one of the greatest headaches. He found solace in the prospect of an instrument of instructions being issued to the President, which would guide the President in the matter of appointment to the Election. Noticing

the uncertainty about the prospect, however, it was and to allay the apprehensions voiced by both Professor Saxena and Pandit Kunzru, that Article 324(2), as it presently obtains, came to be proposed by way of the amendment to the amendment of the original Article. In other words, before the words 'be made by the President', the words 'subject to provisions of any law made in this behalf by Parliament'. came to be inserted.

32. We understand the historical perspective, and the deliberations of the Fundamental Rights Sub-Committee, the Drafting Committee and the other Sub-Committees and, finally, of the Constituent Assembly itself, to be as follows:

> A golden thread runs through these proceedings.
>
> All the Members were of the clear view that election must be conducted by an independent Commission. It was a radical departure from the regime prevailing under the Government of India Act, 1935. The Members very well understood that providing for appointment of Members of the Election Commission by the President would mean that the President would be bound to appoint the Election Commissioner solely on the advice of the Executive, which, in a sense, was understood as on the advice of the Prime Minister. The model of appointment prevailing in the United States was deliberated and not approved. Though, Shri K. M. Munshi was not in favour of giving complete independence to the Election Commission and felt that it should be an ally of the Government, it clearly did not represent the views of the predominant majority of the Members. Right to Vote was, to begin with, considered so sacrosanct that it was originally contemplated as a Fundamental Right. However, finally, as we have already noticed, it was found more appropriate that it should be contained in a separate part of the Constitution, which is the position obtaining under the Constitution. It is equally clear that the Members of the Committees, including the Constituent Assembly, wanted the appointment to the Election Commission not to be made by the Executive.
>
> The uncertain prospect of an instrument of instructions, finally led the Assembly to adopt the amendment suggested by Dr. Ambedkar, which, as we have noticed, was initially the suggestion made by Pandit Kunzru, and what is more, even seconded by Shri K. M. Munshi. In short, what the Founding Fathers clearly contemplated and intended was, that Parliament would step-in and provide norms, which would govern the appointment to such a uniquely important post as the post of Chief Election Commissioner and the Election Commissioners. In this regard, we notice the final words of Dr. Ambedkar in regard to the debate surrounding Article 324, was that he felt sorry that he did not have time to circulate the amendments.

33. It is important that we understand that when the Founding Fathers, therefore, inserted the words 'subject to the provisions of any law to be made by Parliament', it was intended that Parliament would make a law. While we would not go, so far as to hold that Parliament was under a compellable duty, which this Court can enforce by a Mandamus, to make a law, all that we are

finding is that the Constituent Assembly clearly intended that Parliament must make a law within the meaning of Article 324(2). Such an understanding of Article 324(2) may be contrasted with similar provisions in the Constitution, which also contemplated enabling the making of law by Parliament. This brings us to the question relating to an evaluation of similar provisions in the Constitution.

M. ARTICLES IN THE CONSTITUTION, WHICH EMPLOY THE WORDS 'SUBJECT TO ANY LAW' TO BE MADE BY PARLIAMENT AS CONTAINED IN ARTICLE 324

34. One of the contentions of the respondent-Union is that this Court must bear in mind the snowballing effect of the interpretation canvassed by the petitioners being accepted on other situations governed by other Articles.

35. Articles in the Constitution, which employ the words 'subject to any law' to be made by Parliament as contained in Article 324.

36. Article 98 provides that each House of Parliament shall have a separate Secretarial Staff. Article 98(2) provides that Parliament may, by law, regulate the recruitment and conditions of the staff. Article 98(3) empowers the President, in consultation with the Speaker of the House of People or Chairman of the Council of States, to make Rules, till Parliament makes law. Apart from the dissimilarity, it is to be noticed that, even in the matter governed by Article 98, if not law, Rules are to govern.

37. Article 137 declares that, subject to the provisions of any law made by Parliament or Rules made under Article 145, Supreme Court shall have the power of review. It will be noticed that in the first place, the Supreme Court has framed rules, regulating the power to review. The absence of a law made by Parliament would have little effect. The purport of Article 137 has absolutely no comparison with Article 324(2). Article 142(2) uses the same expression, viz., 'subject to the provisions of any law made by Parliament' and it provides that the Supreme Court is to have power for ordering the attendance of any person, the discovery or protection of any document or the investigation or punishment for any contempt. Patently, the absence of any law under Article 142 cannot produce the impact, which Article 324(2) is capable of producing and, what is more, vouchsafed by the debates in the Constituent Assembly.

38. Article 145 uses the expression 'subject to the provisions of any law made by Parliament', Supreme Court can make Rules for regulating the practice and procedure of the Court. It is self-evident that it bears no resemblance to the context, purpose and background of Article 324(2).

39. Article 146 of the Constitution of India reads as follows:

> "146. Officers and servants and the expenses of the Supreme Court (1) Appointments of officers and servants of the Supreme Court shall be made by the Chief Justice of India or such other Judge or officer of the Court as he may direct: Provided that the President may by rule require that in such cases as may be specified in the rule, no

> person not already attached to the Court shall be appointed to any office connected with the Court, save after consultation with the Union Public Service Commission (2) Subject to the provisions of any law made by Parliament, the conditions of service of officers and servants of the Supreme Court shall be such as may be prescribed by rules made by the Chief Justice of India or by some other Judge or officer of the Court authorised by the Chief Justice of India to make rules for the purpose: Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the President (3) The administrative expenses of the Supreme Court, including all salaries, allowances and pensions payable to or in respect of the offices and servants of the Court, shall be charged upon the Consolidated Fund of India, and any fees or other moneys taken by the court shall form part of that Fund."

40. Article 146(2) is essentially a matter which deals with the conditions of service of Officers and Servants of Supreme Court. In regard to the said employees, the Founding Fathers have provided for Rule-making power with the Chief Justice of India. We are clear in our minds that apart from the fact, the rule-making power is lodged with the Chief Justice of India, there cannot be any valid comparison between the employees of the Supreme Court and the members of the Election Commission. There is no safeguard provided against the removal as is contemplated for the Chief Election Commissioner and Election Commissioners. Article 148 deals with appointment of the Comptroller and Auditor General of India. It reads as follows:

> "148. Comptroller and Auditor General of India (1) There shall be a Comptroller and Auditor General of India who shall be appointed by the President by warrant under his hand and seal and shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court (2) Every person appointed to be the Comptroller and Auditor General of India shall, before he enters upon his office, make and subscribe before the President, or some person appointed in that behalf by him, an oath or affirmation according to the form set out for the purpose in the Third Schedule (3) The salary and other conditions of service of the Comptroller and Auditor General shall be such as may be determined by Parliament by law and, until they are so determined, shall be as specified in the Second Schedule:
>
> Provided that neither the salary of a Comptroller and Auditor General nor his rights in respect of leave of absence, pension or age of retirement shall be varied to his disadvantage after his appointment (4) The Comptroller and Auditor General shall not be eligible for further office either under the Government of India or under the Government of any State after he has ceased to hold his office (5) Subject to the provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the administrative powers of the Comptroller and Auditor General shall be such as may be prescribed by rules made by the President after consultation with the Comptroller and Auditor General (6) The Administrative expenses of the office of the Comptroller and Auditor General, including all salaries, allowances and pensions payable to or in

respect of pensions serving in that office, shall be charged upon the Consolidated Fund of India."

41. As far as the appointment of the Comptroller and Auditor General is concerned, it is governed by Article 148(1) and the Founding Fathers have provided beyond the pale of any doubt that the appointment of the Comptroller and Auditor General, vital and indispensable as he is for the affairs of the nation, his appointment is to be made by the President. The safeguard, however, considered suitable to ensure his independence has been declared by providing that the CAG can be removed only in like manner and on like grounds as a Judge of the Supreme Court. In stark contrast, Article 324(2) has, while it has provided for the appointment of the Chief Election Commissioner and the Election Commissioners by the President, it has been made subject to a law to be made by the Parliament. No such provision is provided in Article 148(1). We cannot be oblivious to the fact that this is apart from providing for the safeguard in the first proviso to Article 324(5) that the Chief Election Commissioner shall not be removed except in like manner and like grounds as a Judge of Supreme Court of India. Still further, there is a third distinguishing feature between the Chief Election Commissioner and the CAG again located in the first proviso to Article 324(5). It is declared that the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment. The Chief Election Commissioner and Election Commissioners stand on a far higher pedestal in the constitutional scheme of things having regard to the relationship between their powers, functions and duties and the upholding of the democratic way of life of the nation, the upkeep of Rule of Law and the very immutable infusion of life into the grand guarantee of equality under Article 14.

42. Article 187 provides for a Secretariat for the State Legislature. Except for the difference in the Legislative Body being the State Legislature and the Governor taking the place of the President, it mirrors Article 98 of the Constitution.

43. Article 229 deals with Officers, servants and expenses of High Court. There cannot be any valid comparison between the Chief Election Commissioner and the Election Commissioners contemplated under Article 324(2) and the Officers and servants of the High Court. The very fact that Officers covered by Article 229(2) are not extended any protection against removal, itself not merely furnishes a significant starting point but may itself be conclusive of the dissimilarity between the persons associated with the Central Election Commission and the employees covered by Article 229(2).

44. Article 229(2) deals with the Officers, expense and servants of the High Court. Since Article 229 is pari materia with Article 146(2), we would find merit in the same rationale, which we have furnished for not comparing the employees with the persons governed by Article 324(2).

45. Article 243(k) is part of Part IX of the Constitution, which was inserted by the Constitution (Seventy Third) Amendment Act, 1992. Part IX deals with the panchayats. Article 243(k) reads as follows:

> "243K. Elections to the Panchayats The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.
>
> (2) Subject to the provisions of any law made by the Legislature of a State the conditions of service and tenure of office of the State Election Commissioner shall be such as the Governor may by rule determine: Provided that the State Election Commissioner shall not be removed from his office except in like manner and on the like ground as a Judge of a High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.
>
> (3) The Governor of a State shall, when so requested by the State Election Commission, make available to the State Election Commission such staff as may be necessary for the discharge of the functions conferred on the State Election Commission by clause (1). (4) Subject to the provisions of this Constitution, the Legislature of a State may, by law, make provision with respect to all matters relating to, or in connection with, elections to the Panchayats."

46. Article 243(k)(1) contemplates the appointment of the State Election Commissioner to be made by the Governor. Article 243(k)(2) contemplates that the conditions of service and the tenure of the State Election Commissioner is to be such as maybe made by the Governor by Rule and this is, however, made subject to the provisions of any law made by the Legislature of a State. It is, no doubt, again true that the Parliament, while inserting Article 243K, has partly insulated the State Election Commissioner by providing that he shall not be removed from Office except in like manner and on like ground as a Judge of the High Court. Similarly, in the proviso to Article 243K(2), the conditions of service of the State Election Commissioner cannot be varied to his disadvantage after his appointment. It must be noticed that Parliament was aware of the mandate of Article 324(2) when it inserted Article 243. Parliament has carefully chosen not to provide for the making of any law as regards the appointment of the State Election Commissioner. In fact, this may leave no choice for a Court to step-in and provide for the matter of appointment as regards the State Election Commissioner. However, we need not explore the matter further having regard to the stark contrast between Article 243K on the one hand and Article 324(2) on the other. As far as the conditions and tenure forming the subject matter of a law to be made by the Legislature of the State, we would think that in keeping with the position and the subject matter of Article 243K(2), it may not be apposite to project Article 243K(2) as a premise to reject the request of the petitioners to place the interpretation on Article 324(2), if it is otherwise justified.

47. Article 338(2) provides that subject to the provisions of any law made by Parliament, the National Commission for Scheduled Caste was to consist of a Chairman, Vice-Chairman and three other Members and the conditions of service and tenure of Office, were to be such as the President, may by Rule, determine. An identical provision is contained in Article 338A(2) as regards National Commission for Scheduled Tribes. Not unnaturally, in Article 338B(2), similar provisions are contained in regard to National Commission for Backward Classes. What is, however, pertinent to

notice is Article 338(3). It provides:

> "The Chairperson, the Vice-Chairperson and other Members of the Commission shall be appointed by the President by warrant under his hand and seal." Identical provisions have been made vide Article 338A and Article 338B.

48. We would notice that pertinently, Articles 338, 338A and 338B contemplates a law to regulate the conditions of service and tenure of the Members of the National Commission for Scheduled Castes, Scheduled Tribes and Backward Classes. Article 324(5) contemplates a law being made to regulate the conditions of service and the tenure of Office of the Election Commissioners. Most pertinently, Parliament has enacted the 1991 Act, as contemplated in Article 324(5). It is, when it comes to providing for the appointment of the Election Commissioners, which was clearly in the contemplation of the Founding Fathers that no law has been made. The old regime continues. In regard to the Members of the National Commissions, covered by Articles 338, 338A and 338B, the Constitution is clear that the appointment is to be made by President.

49. Article 367(3) deals with the meaning of a foreign State for the purpose of the Constitution and after declaring it to be 'any State' other than India, makes it, subject to a proviso, which declares that subject to the provisions of any law made by Parliament, the President may, by order, declare any State not to be a foreign State for such purposes, as may be specified in the Order. The matter is governed fully by the Constitution (Declaration as to Foreign States) Order, 1950. Apart from the apparent absence of any imperative need for a law, the matter is governed by an Order, which is issued under the Constitution, which itself would be of a statutory nature and also issued under an enabling provision of the Constitution itself. No further discussion is needed to conclude that Article 324(2) is unique in its setting and purpose. N. DEVELOPMENTS AFTER 26 JANUARY 1950; THE CHIEF ELECTION COMMISSIONERS AND THE ELECTION COMMISSIONERS WHO WERE APPOINTED AND THEIR TERMS

50. In the year 1951, Shri Sukumar Sen was appointed as the first Chief Election Commissioner of India. He was a Civil Servant and a former Chief Secretary of the State of West-Bengal. His term was to last for eight years and two hundred and seventy-three days. Shri Kalyan Sundaram, the second Chief Election Commissioner, again a Civil Servant, the first Law Secretary and who also chaired the Indian Law Commission for the period from 1968 to 1971, was appointed as Chief Election Commissioner on 20.12.1958 and his term terminated on 30.09.1967. It is noteworthy that his term also lasted eight years and two hundred and eighty-four days.

51. The Government of India (Transaction of Business) Rules, 1961 have been referred to by the parties. Insofar as it is relevant, we may notice them. Under Rule 8, the cases to be submitted to the Prime Minister and President, are described as all cases of the nature specified in the Third Schedule. In the Third Schedule, Serial No.22 describes appointment, resignation and removal of the Chief Election Commissioner and other Election Commissioners in Column 1 under the heading 'nature of cases'. Article 324 is referred to, under the Column 'authority to whom the matter is submitted, it is indicated 'the Prime Minister and the President'.

52. Shri S.P. Sen Verma was the third Chief Election Commissioner and he was appointed on 01.10.1967 and he continued till 30.09.1972 (his term lasted for five years). Shri Nagendra Singh, a Civil Servant and a Member of the Constituent Assembly and who, later on, became the Judge of the International Court of Justice, had a short tenure as the fourth Chief Election Commissioner from 01.10.1972 to 06.02.1973 (his term lasted for one hundred and twenty-eight days). The fifth Chief Election Commissioner was Shri T. Swaminathan, who was also a Civil Servant, having become a Cabinet Secretary as well and his stint as Chief Election Commissioner was from 07.02.1973 to 17.06.1977 (his term lasted for four years and ten days). Shri S.L. Shakdher was appointed as the Sixth Chief Election Commissioner. He was also a Civil Servant and Secretary General of the Lok Sabha. His term commenced on 18.06.1977 and expired on 17.06.1982 (his term lasted for four years and three hundred and sixty-four days). Shri R. K. Trivedi, the Seventh Chief Election Commissioner, was also a Civil Servant, and he had a term of three years and one hundred and ninety- six days. Shri R.V.S. Perishastri was the Eighth Chief Election Commissioner. He was the Secretary to Government and his term lasted from 01.01.1986 till 25.11.1990. It was for the first time that Election Commissioners, two in number, viz., Shri V. S. Seigell and Shri S. S. Dhanoa came to be appointed as Election Commissioners on 16.10.1989. However, as we shall see in greater detail, the Notification dated 16.10.1989 came to be rescinded on 01.01.1990. The same came to be challenged by Shri S.S. Dhanao and it culminated in the Judgment of this Court reported in S.S. Dhanoa v. Union of India and Others12. A Committee known as the Goswami Committee, made certain recommendations. On its heels, Parliament passed an Act titled 'The Chief Election Commissioner and other Commissioners (1991) 3 SCC 567 (Conditions of Service) Act, 1991 (hereinafter referred to as, 'the 1991 Act'). It is noteworthy that this is the law made by Parliament and relatable to Article 324(5), which contemplated a law made by Parliament regulating conditions of service of the Chief Election Commissioner and the Election Commissioners. Smt. V.S. Ramadevi, who had the shortest tenure as the ninth Chief Election Commissioner was drawn from the Civil Services. Her term lasted for sixteen days. The Tenth Chief Election Commissioner was none other than Shri T. N. Sheshan, who was the Eighteenth Cabinet Secretary of India and had a term of six years commencing from 12.12.1990 till 11.12.1996. The 1991 Act came to be amended, initially, by an Ordinance, and later, by a law made by Parliament, the Ordinance being published on 01.10.1993. Shri M.S. Gill and Shri G.V.G. Krishnamurthy were appointed as Election Commissioners, w.e.f., 01.10.1993. The amendment and the appointments came to be challenged by Shri T. N. Seshan, the Chief Election Commissioner and others and the challenge was repelled by a Constitution Bench of this Court and the Judgment is reported in T.N. Seshan, (supra). We would observe that what was essentially contemplated by founding Fathers was an Election Commission, which was to consist of a permanent figure, viz., the Chief Election Commissioner and such Election Commissioners, as may be necessary. For nearly forty years after the adoption of the Constitution of India, there were only Chief Election Commissioners. After the Judgment in T.N. Seshan (supra), it will be noticed that thereafter, the Election Commission of India became a team consisting of the Chief Election Commissioner and the two Election Commissioners. With the term of Shri T. N. Seshan coming to an end 11.12.1996, the trend began of appointing the Election Commissioners as Chief Election Commissioners. Thus, Shri M.S. Gill became the Chief Election Commissioner. Shri M.S. Gill was also a Civil Servant. He served as Chief Election Commissioner for a period of four years and sixty-nine days, i.e., from 12.12.1996 till 13.06.2001. Shri G.V.G. Krishnamurthy continued till 30.09.1999 (nearly six years) as Election Commissioner. Shri James Michael Lyngdoh became an

Election Commissioner in the year 1997 and was made the Chief Election Commissioner on 14.06.2001, on the expiry of the term of Shri M.S. Gill, and he continued till 07.02.2004 (the term lasted two years and two hundred and sixty-nine days). Thereafter, we may notice, for the period 2000 to 2022, the details of the Election Commissioners and the Chief Election Commissioners and the length of the tenure, which is as follows:

Sl. Name of Tenure as Tenure as Length of No. Commissioner EC CEC Tenure

1. T.S. Jan 2000 – 08.02.2004 5 yrs 3 Krishnamurthy, 07.02.200 - mts 16 EC 4 15.05.2005 days

2. B. B. Tandon, 13.06.200 16.05.2005 5 yrs 17 EC 1 – - days 15.05.200 29.06.2006

3. N.Gopalaswamy, 08.02.200 30.06.2006 5 yrs 2 EC 4- - mts 13 29.06.200 20.04.2009 days

4. Navin 16.05.200 21.04.2009 5 yrs 2 B.Chawla, EC 5- -29- mts 14 20.04.200 07.2010 days

5. Shri S.Y. 30.06.200 30.07.2010 5 yrs 11 Quraishi, EC 6- - mts 12 29.07.201 10.06.2012 days

6. Shri V.S. 21.04.200 11.06.2012 5 yrs 8 Sampath, EC 9- - mts 26 10.06.201 15.01.2015 days

7. H.S. Brahma, EC 24.08.201 16.01.2015 4 yrs 7 0- - mts 26 18.04.2015 days 15.01.201

8. Nasim Zaidi, EC 07.01.2012- 19.04.2015- 4 yrs 10 18.04.2015 05.07.2017 mts 29 days

9. Achal Kumar 07.05.201 06.07.2017 2 years 8 Joti, EC 5- - mts 16 08.07.201 22.01.2018 days

10. O.P. Rawat, EC 14.08.201 23.01.2018 3 yrs 3 5- - mts 18 22.01.201 01.12.2018 days

11. Sunil Arora, EC 31.08.201 02.12.2018 3 yrs 7 7-01- - mts 13 12.2018 12.04.2021 days

12. Ashok Lavasa, 23.01.201 (N/A 2 yrs 7 EC 8- because of mts 9 31.08.202 voluntary days 0 resignatio

n)

13. Sushil 15.02.201 13.04.2021 3 yers 3 Chandra, EC 9- - mts 12.04.202 14.05.2022

14. Rajiv Kumar, EC 01.09.202 15.05.2022 4 yrs 8 0- - mts 14 18.02.202 14.05.2022 days 5 (expected)

15. Anup Chandra 08.06.202 2 yrs 8 Pandey, EC 1- mts 7 14.02.202 days 4 (expected) O. A CLOSER LOOK AT S.S. DANOA (SUPRA), THE 1991 ACT AND T.N. SESHAN (SUPRA)

53. It was on 07.10.1989 that the President, in exercise of his powers under Clause 2 of Article 324 of the Constitution, fixed the number of Election Commissioners as two. This was to continue until further orders. Later on, on 16.10.1989, two persons of which, one was Shri S.S. Dhanoa, were appointed as the Election Commissioners. It was for the first time after Independence that Election Commissioners were appointed, thereby making the Election Commission of India a multi-Member Commission. In other words, till 16.10.1989, the Chief Election Commissioner constituted the Election Commission of India. The multi-Member Commission was, however, a short-lived affair. In less than three months' time, on 01.01.1990, exercising power under Article 324(2), the President notified, with immediate effect, the rescinding of the Notification dated 07.10.1989, by which Notification, the two posts of Election Commissioner had been created. Another Notification rescinding the Notification dated 16.10.1989, by which the two Election Commissioners were appointed, came to be issued. The latter Notifications came to be challenged by Shri S.S. Dhanoa before this Court. A Bench of two learned Judges dismissed the Writ Petition. This Court took the view, inter alia, that the framers of the Constitution did not want to give same status to the Election Commissioners as was conferred on the Chief Election Commissioner. In the course of this Judgment in S.S. Dhanoa v. Union of India and others13, this Court, inter alia, observed as follows:

> "17. ... There is no doubt that there is an important distinction between the Council of Ministers and the Election Commission in that whereas the Prime Minister or the Chief Minister is appointed by the President or the Governor and the other Ministers are appointed by the President or the Governor on the advice of the Prime Minister or the Chief Minister, the appointment of both the Chief Election Commissioner and the other Election Commissioners as the law stands today, is made by the President under Article 324(2) of the Constitution. It has, however, to be noted that the provisions of the said article have left the matter of appointment of the Chief Election Commissioner and the other Election Commissioners to be regulated by a law to be made by the Parliament, and the President exercises the power of appointing them today because of the absence of such law which has yet to be made. ..." (Emphasis supplied)
>
> 54. We may notice paragraph 18, dealing with the manner in which a multi-Member Commission must act.

(1991) 3 SCC 567 Thereafter, the Court went on to find that there was really no need to have appointed the Election Commissioners and, still further made the following observations:

> "26. There is no doubt that two heads are better than one, and particularly when an institution like the Election Commission is entrusted with vital functions, and is

armed with exclusive uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however, all-wise he may be. It ill conforms the tenets of the democratic rule. It is true that the independence of an institution depends upon the persons who man it and not on their number. A single individual may sometimes prove capable of withstanding all the pulls and pressures, which many may not. However, when vast powers are exercised by an institution which is accountable to none, it is politic to entrust its affairs to more hands than one. It helps to assure judiciousness and want of arbitrariness. The fact, however, remains that where more individuals than one, man an institution, their roles have to be clearly defined, if the functioning of the institution is not to come to a naught." (Emphasis supplied)

55. The Court found that it was not a case of removal of the Election Commissioners within the meaning of the second proviso to Article 324(5).

56. This led to certain changes in the 1991 Act. The changes were introduced through an Ordinance published in the Gazette of India on 01.10.1993. It, inter alia, provided for a new Chapter III, which contemplates that as far as possible, all business shall be transacted unanimously (Section 10(2) of the 1991 Act). Section 10(3) provides that subject to Section 10(2), in case of difference of opinion, the matter is to be decided according to the opinion of the majority. This, it must be noticed, was introduced in the context of the observations in S.S. Dhanoa (supra). By the Ordinance dated 01.10.1993, other far-reaching changes were introduced, which, inter alia, provided for bringing the Election Commissioners substantially on par with the Chief Election Commissioner. The Chief Election Commissioner, it must be noticed, under the 1991 Act, was to be paid a salary equal to the Judge of the Supreme Court. The Election Commissioner was to be paid the salary equal to the Judge of the High Court. After the amendment, they stand equated. The 1991 Act also provided that the Chief Election Commissioner would be entitled to continue in Office till the age of 65 years whereas the Election Commissioner was to continue in Office till he attains the age of 62 years. The age of superannuation of the Chief Election Commissioner and the Election Commissioner was brought on par by the Ordinance insofar as both were entitled to continue for a period of six years subject to their liability to vacate Office should they attain the age of 65 years before the expiry of six years from the date on which they assumed Office. However, under the first proviso to Article 324(5), the Chief Election Commissioner can be removed from his Office only in the manner and on the like grounds as the Judge of the Supreme Court of India. The first proviso also prohibits the conditions of service of the Chief Election Commissioner being varied to his disadvantage after his appointment. In the matter of the removal of the Election Commissioner or a Regional Commissioner the second proviso to Article 324(5) provides the safeguard for the Election Commissioner or a Regional Commissioner that they cannot be removed except on the recommendation of the Chief Election Commissioner. On 01.10.1993, again, in exercise of the powers under Article 324(2), the President fixed until further orders, the number of Election Commissioners other

than the Chief Election Commissioner at two. Two Election Commissioners also came to be appointed w.e.f. 01.10.1993. The Ordinance, which had been passed on 01.10.1993, became Act No. 4 of 1994 on 04.01.1994. This led to certain Writ Petitions being filed calling in question the Ordinance including at the instance of Shri T.N. Seshan, who, it must be noticed, was appointed earlier on 12.12.1990 as the Chief Election Commissioner. He challenged the Ordinance on various grounds. Matters engaged the attention of the Constitution Bench and its decision is reported in T.N. Seshan, Chief Election Commissioner of India v. Union of India and others14. The Constitution Bench, we may notice, made the following observations:

"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 (1995) 4 SCC 611 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. This objective is achieved by the setting up of an Election Commission, a permanent body, under Article 324(1) of the Constitution. The superintendence, direction and control of the entire election process in the country has been vested under the said clause in a commission called the Election Commission. Clause (2) of the said article then provides for the constitution of the Election Commission by providing that it shall consist of the CEC and such number of ECs, if any, as the President may from time to time fix. It is thus obvious from the plain language of this clause that the Election Commission is composed of the CEC and, when they have been appointed, the ECs. The office of the CEC is envisaged to be a permanent fixture but that cannot be said of the ECs as is made manifest from the use of the words "if any". Dr Ambedkar while explaining the purport of this clause during the debate in the Constituent Assembly said:

"Sub-clause (2) says that there shall be a Chief Election Commissioner and such other Election Commissioners as the President may, from time to time appoint. There were two alternatives before the Drafting Committee, namely, either to have a permanent body consisting of four or five members of the Election Commission who would continue in office throughout without any break, or to permit the President to have an ad hoc body appointed at the time when there is an election on the anvil. The Committee has steered a middle course. 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." It is crystal clear from the plain language of the said clause (2) that our Constitution-makers realised the need to set up an independent body or commission which would

be permanently in session with at least one officer, namely, the CEC, and left it to the President to further add to the Commission such number of ECs as he may consider appropriate from time to time. Clause (3) of the said article makes it clear that when the Election Commission is a multi-member body the CEC shall act as its Chairman. What will be his role as a Chairman has not been specifically spelt out by the said article and we will deal with this question hereafter. Clause (4) of the said article further provides for the appointment of RCs to assist the Election Commission in the performance of its functions set out in clause (1). This, in brief, is the scheme of Article 324 insofar as the constitution of the Election Commission is concerned."

57. This Court went on to disagree with certain parts of the Judgment in S.S. Dhanoa (supra). The Court, inter alia, held that the Election Commission of India can be a single-Member Body or a multi-Member Body. It was further held as follows:

"16. While it is true that under the scheme of Article 324 the conditions of service and tenure of office of all the functionaries of the Election Commission have to be determined by the President unless determined by law made by Parliament, it is only in the case of the CEC that the first proviso to clause (5) lays down that they cannot be varied to the disadvantage of the CEC after his appointment. Such a protection is not extended to the ECs. But it must be remembered that by virtue of the Ordinance the CEC and the ECs are placed on a par in the matter of salary, etc. Does the absence of such provision for ECs make the CEC superior to the ECs? The second ground relates to removability. In the case of the CEC he can be removed from office in like manner and on the like ground as a Judge of the Supreme Court whereas the ECs can be removed on the recommendation of the CEC. That, however, is not an indicia for conferring a higher status on the CEC. To so hold is to overlook the scheme of Article 324 of the Constitution. It must be remembered that the CEC is intended to be a permanent incumbent and, therefore, in order to preserve and safeguard his independence, he had to be treated differently. That is because there cannot be an Election Commission without a CEC. That is not the case with other ECs. They are not intended to be permanent incumbents. Clause (2) of Article 324 itself suggests that the number of ECs can vary from time to time. In the very nature of things, therefore, they could not be conferred the type of irremovability that is bestowed on the CEC. If that were to be done, the entire scheme of Article 324 would have to undergo a change. In the scheme of things, therefore, the power to remove in certain cases had to be retained. Having insulated the CEC from external political or executive pressures, confidence was reposed in this independent functionary to safeguard the independence of his ECs and even RCs by enjoining that they cannot be removed except on the recommendation of the CEC. This is evident from the following statement found in the speech of Shri K.M. Munshi in the Constituent Assembly when he supported the amended draft submitted by Dr Ambedkar:

"We cannot have an Election Commission sitting all the time during those five years doing nothing. The Chief Election Commissioner will continue to be a whole-time

officer performing the duties of his office and looking after the work from day to day but when major elections take place in the country, either Provincial or Central, the Commission must be enlarged to cope with the work. More members therefore have to be added to the Commission. They are no doubt to be appointed by the President. Therefore, to that extent their independence is ensured. So there is no reason to believe that these temporary Election Commissioners will not have the necessary measure of independence." Since the other ECs were not intended to be permanent appointees they could not be granted the irremovability protection of the CEC, a permanent incumbent, and, therefore, they were placed under the protective umbrella of an independent CEC. This aspect of the matter escaped the attention of the learned Judges who decided Dhanoa case [(1991) 3 SCC 567] . We are also of the view that the comparison with the functioning of the executive under Articles 74 and 163 of the Constitution in paragraph 17 of the judgment, with respect, cannot be said to be apposite." (Emphasis supplied)

58. Dealing with the argument that as the Chief Election Commissioner is designated as the Chairman, it put him on a higher pedestal, this Court, inter alia, held as follows:

"19. ... The function of the Chairman would, therefore, be to preside over meetings, preserve order, conduct the business of the day, ensure that precise decisions are taken and correctly recorded and do all that is necessary for smooth transaction of business. The nature and duties of this office may vary depending on the nature of business to be transacted but by and large these would be the functions of a Chairman. He must so conduct himself at the meetings chaired by him that he is able to win the confidence of his colleagues on the Commission and carry them with him. This a Chairman may find difficult to achieve if he thinks that others who are members of the Commission are his subordinates. The functions of the Election Commission are essentially administrative but there are certain adjudicative and legislative functions as well. The Election Commission has to lay down certain policies, decide on certain administrative matters of importance as distinguished from routine matters of administration and also adjudicate certain disputes, e.g., disputes relating to allotment of symbols. Therefore, besides administrative functions it may be called upon to perform quasi-judicial duties and undertake subordinate legislation-making functions as well. See Mohinder Singh Gill v. Chief Election Commr [(1978) 1 SCC 405 : (1978) 2 SCR 272] . We need say no more on this aspect of the matter."

59. Still further, we may notice the following discussion, which brings out the rationale for treating the Chief Election Commissioner differently from the Elections Commissioners:

"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 supplied)
>
> 60. It is clear that the founding fathers intended that the elections in the country must be under the superintendence, direction and control of an independent Body. The Body is the Election Commission of India. Under Article 324, the Chief Election Commissioner is an unalterable feature or figure. A Commission can consist of only the Chief Election Commissioner. A multi-Member Commission was also contemplated by the founding fathers. However, the post of Election Commissioner was to be need based. For nearly four decades, there was no Election Commissioner. As we have noticed, it is on 16.10.1989 that the first two Election Commissioners were appointed. In regard to the appointment of the Chief Election Commissioner and other Election Commissioners, the Constitution does not provide for any criteria. It does not fix any qualifications. It does not prescribe any disqualifications in the matter of appointment as either Chief Election Commissioner or Election Commissioner.
>
> 61. The appointees have been bureaucrats drawn from the Civil Services. Article 324(5) deals with the conditions of service and tenure of Office of the Election Commissioners and the Regional Commissioners.

Till Parliament made any law with regard to the same, the founding fathers clothed the President with power to lay down the conditions of service and tenure of Office by Rule. It is to lay down the conditions of service and tenure of Office that Parliament has enacted the 1991 Act. The first proviso to sub-Article 324(5) acts as a guarantee against the removal of the Chief Election Commissioner except on like grounds and a similar manner a Judge of the Supreme Court can be removed. The conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment. This means that Parliament cannot, nor can the Government by Rule, either remove the Chief Election Commissioner, except by impeaching him in the manner provided for the removal of a Judge of Supreme Court nor can Parliament make law nor Government a Rule to vary the conditions of service of the Chief Election Commissioner to his disadvantage, after he is appointed. The first proviso to Article 324(5) operates as a singular insulation to protect the Chief Election Commissioner from either being arbitrarily removed or his conditions of service being varied to his disadvantage. But as contemplated by the founding fathers, protection against arbitrary

removal or protection against varying of conditions of the appointment were not the sole safeguards. Far more vital was the appointment of the 'right man' and the need to take it out of the exclusive hands of the executive.

P. THE CLAMOUR FOR REFORMS

62. In the year 1990, the Government of India constituted a Committee under the Chairmanship of the then Law Minister, Shri Dinesh Goswami and it is hereinafter referred to as the 'Goswami Committee'. It made several recommendations relating to electoral reforms. The Committee, inter alia, recommended as follows:

> "CHAPTER II Electoral Machinery
>
> 1. Set up of multi-member Commission
>
> 1. The Election Commission should be a multi- member body with three members.
>
> 2. The Chief Election Commissioner should be appointed by the President in consultation with the Chief Justice of India and the Leader of the Opposition (and in case no Leader of Opposition is available, the consultation should be with the Leader to the largest opposition group in the Lok Sabha).
>
> 3. The consultation process should have a statutory backing.
>
> 4. The appointment of other two Election Commissioners should be made in consultation with Chief Justice of India, the Leader of the Opposition (in case no Leader of Opposition is available, the consultation should be with the Leader to the largest opposition group in the Lok Sabha) and the Chief Election Commissioner.
>
> 5. The appointment of Regional Commissioners for different zones is not favoured. Such appointments should be made only as and when necessary and not on a permanent footing.
>
> 2. Steps for securing independence of the Commission
>
> 6. The protection of salary and other allied matters relating to the Chief Election Commissioner and the Election Commissioners should be provided for in the Constitution itself on the analogy of the provisions in respect of the Chief Justice and Judges of the Supreme Court. Pending such measures being taken, a parliamentary law should be enacted.
>
> 7. The expenditure of the Commission should continue to be 'voted' as of now.

> 8. The Chief Election Commissioner and the Election Commissioners should be made ineligible not only for any appointment under the Government but also to any office including the office of Governor appointment to which is made by the President.
>
> 9. The tenure of the Chief Election Commissioner and other Election Commissioners should be for a term of five years or sixty-

five years of age, whichever is later and they should in no case continue in office beyond sixty-five years and for more than ten years in all."

63. In the year 1991, Parliament enacted the Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991. Section 3 provides, as it stands, that there shall be paid to the Chief Election Commissioner and other Election Commissioners a salary, which is equal to the salary of the Judge of the Supreme Court. Section 4 deals with the term of Office and reads as follows:

> "4. Term of office. —The Chief Election Commissioner or an Election Commissioner shall hold office for a term of six years from the date on which he assumes his office:
>
> Provided 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:
>
> Provided further that the Chief Election Commissioner or an Election Commissioner may, at any time, by writing under his hand addressed to the President, resign his office.
>
> Explanation.—For the purpose of this section, the term of six years in respect of the Chief Election Commissioner or an Election Commissioner holding office immediately before the commencement of this Act, shall be computed from the date on which he had assumed office."

64. Section 5 deals with the leave available to both the Chief Election Commissioner or an Election Commissioner. The power to grant relief or refuse leave to them vests with the President. Section 6 deals with their right to pension. Section 7 deals with the right to subscribe to the general provident fund. Section 8 provides for other conditions of service:

> "8. Other conditions of service.—Save as otherwise provided in this Act, the conditions of service relating to travelling allowance, provision of rent-free residence and exemption from payment of income-tax on the value of such rent-free residence, conveyance facilities, sumptuary allowance, medical facilities and such other conditions of service as are, for the time being, applicable to a Judge of the Supreme Court under Chapter IV of the Supreme Court Judges (Conditions of Service) Act, 1958 (41 of 1958) and the rules made thereunder, shall, so far as may be, apply to the

Chief Election Commissioner and other Election Commissioners."

65. Under Section 9, the business of the Election Commissioner is to be transacted in accordance with the 1991 Act. Section 10 provides for disposal of business by Election Commission, it reads as follows:

> "10. Disposal of business by Election Commission. — (1) The Election Commission may, by unanimous decision, regulate the procedure for transaction of its business as also allocation of its business amongst the Chief Election Commissioner and other Election Commissioners.
>
> (2) Save as provided in sub-section (1), all business of the Election Commission shall, as far as possible, be transacted unanimously.
>
> (3) Subject to the provisions of sub-section (2), if the Chief Election Commissioner and other Election Commissioners differ in opinion on any matter, such matter shall be decided according to the opinion of the majority."

66. In the year 1993, the Government of India constituted, what is known as the 'Vohra Committee'. It made certain recommendations in regard to the CBI and the IB. Five years thereafter, in 1998, Government of India appointed a Committee under the Chairmanship of Shri Indrajit Gupta Committee on State funding of elections. The Committee submitted its Report in December, 1998. The conclusion and summary of the recommendations are found in Chapter 9 and they include various recommendations relating to funding of political parties.

67. In the year 2002, a National Commission for reviewing the work of the Constitution, under the Chairmanship of the Former Chief Justice of India, M.N. Venkatachaliah, made 58 recommendations involving amendments to the Constitution, 86 recommendations relating to legislative measures and the rest involved Executive action. In relation to electoral processes and political parties, various recommendations were made by the Commission. One of the recommendations, which is of relevance to the cases before us is as follows:

> "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, the Leader of the Opposition in the Rajya Sabha, the Speaker of the Lok Sabha and the Deputy Chairman of the Rajya Sabha. It was further recommended that similar procedure should be adopted in the case of appointment of the State Election Commissioners."

68. In the year 2004, the Election Commission of India, on 02.08.2004 made certain proposal on electoral reforms to the Government of India. The proposals included affidavits to be filed by candidates on criminal antecedents, their assets, etc. The aspect about criminalisation of politics is noted as an issue being raised by the Commission from 1998 onwards. The Commission was of the opinion that keeping a person accused of a serious criminal charge and where the Court had framed

charges, out of the electoral arena, would be a reasonable restriction in greater public interest. Among the various reforms it proposed, we notice the following:

> "12. COMPOSITION OF ELECTION COMMISSION AND CONSTITUTIONAL PROTECTION OF ALL MEMBERS OF THE COMMISSION AND INDEPENDENT SECRETARIAT FOR THE COMMISSION Election Commission of India is an independent constitutional body created by the Constitution of India vide Article 324. Clause (I) of Article 324 has vested the superintendence, direction and control of the preparation of 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 of India in the Election Commission.

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

The President has, by Order dated 1.10.1993 under Clause (2) of Article 324, fixed the number of Election Commissioners as two until further orders.

Although the Constitution permits the President to fix the number of Election Commissioners at any number without any limit, it is felt that in the interest of smooth and effective functioning of the Election Commission, the number of Election Commissioners should not be unduly large and should remain as two as presently fixed, in addition to the Chief Election Commissioner. The three-member body is very effective in dealing with the complex situations that arise in the course of superintending, directing and controlling the electoral process, and allows for quick responses to developments in the field that arise from time to time and require immediate solution. Increasing the size of this body beyond the existing three-member body would, in the considered opinion of the Commission, hamper the expeditious manner in which it has necessarily to act for conducting the elections peacefully and in a free and fair manner.

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.

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 Supreme Court and High Courts, etc. Independent Secretariat is vital to the functioning of the Election Commission as an independent constitutional authority. In fact, the provision of 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." (Emphasis supplied)

69. As regards expenses of Election Commission, we find the following complaint and solution:

> "13. EXPENSES OF ELECTION COMMISSION TO BE TREATED AS CHARGED The Commission had sent a proposal that the expenditure of the Commission should be charged on the Consolidated Fund of India. The Government had moved in the 10th Lok Sabha "The Election Commission (Charging of Expenses on the Consolidated Fund of India) Bill, 1994" with the objective of providing for the salaries, allowances and pension payable to the Chief Election Commissioner and other Election Commissioners and the administrative expenses including salaries, allowances and pension of the staff of the Election Commission to be expenditure charged upon the Consolidated Fund of India. Similar provisions already exist in respect of the Supreme Court, Comptroller & Auditor General and the Union Public Service Commission, which are, like the Election Commission, independent constitutional bodies. To secure its independent functioning the Commission is of the opinion that the Bill, which lapsed with the dissolution of the 10th Lok Sabha in 1996, needs reconsideration."

70. The next milestone to be noticed is the Second Administrative Reforms Commission Report made in January, 2007. The Commission consisted of Shri Veerappa Moily, the then Law Minister, as its Chairperson and five other Members. We find the following in the summary of its recommendations, inter alia. It recommended that the Collegium headed by the Prime Minister, with the Speaker of the Lok Sabha, the leader of the Opposition in the Lok Sabha, the Law Minister and the Deputy Chairman of the Rajya Sabha, as Members, should make recommendations for consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners. In the year 2010, the Ministry of Law and Justice, Government of India, had constituted a Committee on Electoral Reforms. The Report, it made, in the year 2010 indicates the background which led to the constitution of the Committee. Reference is made to various earlier Reports as also the efforts being made by the Election Commission. It made various recommendations relating to electoral reforms. Under the head 'measures for Election Commission', an update on the Election Commission's recommendations, includes the following:

> " Sl. Proposal of the Status/Remarks.
>
> No. Election Commission

12	Composition of Election Commission and Constitutional Protection of all Members of the Commission and Independent Secretariat for the Commission.	It was decided to include it as a proposal for regional and national consultation.
13.	Expenses of Election Commission to be Treated as Charged.	The proposal to make the expenses of the Election Commission of India 'charged' was considered by the Dinesh Goswami Committee but was not favoured. In 1994, the Government, however, introduced the Election Commission (Charging of Expenses on the Consolidated Fund of India) Bill, 1994 in Lok Sabha on 16.12.94 which lapsed on the dissolution of the Tenth Lok Sabha. The Department-Related Parliamentary Standing Committee on Home Affairs in its 24th Report on the said Bill presented to Raja Sabha on 28.11.1995 and was of the considered view that there is no need of passing the proposed Bill and recommends that the Bill be dropped. The Election Commission of India

again made a similar proposal in 1997 which was placed before political parties in the all party meeting held on 22.5.1998 but no view was taken. Again, the Election Commission of India made the same proposal in May, 2003 and on the direction of the then Hon'ble Prime Minister the same was placed before the political parties in the all party meeting held on 29.1.2003. The debate on the proposal remained inconclusive.

"

71. In regard to appointment of Chief Election Commissioner and other Election Commissioners, we notice the following remarks:

"

(4) Appointment of Chief Election Commissioner (CEC) and other Election Commissioners (EC) and consequential matters:-	One of the Chief Election Commissioners has requested the Government to have a collegium consisting of the Prime Minister and Leader of Opposition etc. who is empowered to make recommendations for appointments of the CEC and ECs. Further, it has also been suggested

that there should be complete ban for ten years after retirement from the post of CEC to any political party. (Emphasis supplied)"

72. In the year 2015, Law Commission of India, in its Two Hundred and Fifty Fifth Report dated 12.03.2015, dealing with the electoral reforms in India, made various recommendations in regard to strengthening the Office of the Election Commission of India. After referring to Article 324(2), the fact of the appointments being discussed in the Constituent Assembly, Article 324(2) leaving it to the Parliament to legislate, the recommendation of the Goswami Committee in 1990, we find the following discussion:

"6.10.4 This was followed by the introduction of the Constitution (Seventieth Amendment) Bill 1990, which was introduced in the Rajya Sabha on 30th May 1990 providing that the CEC would be appointed by the President after consultation with the Chairman of the Rajya Sabha, the Speaker of the Lok Sabha, and the Leader of the Opposition (or the leader of the largest party) in the Lok Sabha. The CEC was further made a part of the consultative process in the appointment of the Election Commissioners. However, on 13th June 1994, the Government moved a motion to withdraw the Bill, which was finally withdrawn with the leave of the Rajya Sabha on the same day.

6.10.5 Consequently, in the absence of any Parliamentary law governing the appointment issue, the Election Commissioners are appointed by the government of the day, without pursuing any consultation process. This practice has been described as requiring the Law Ministry to get the file approved by the Prime Minister, who then recommends a name to the President. Thus, there is no concept of collegium and no involvement of the opposition.

6.10.6 The Commissioners are appointed for a six year period, or up to the age of 65 years, whichever is earlier. Further, there are no prescribed qualifications for their appointment, although convention dictates that only senior (serving or retired) civil servants, of the rank of the Cabinet Secretary or Secretary to the Government of India or an equivalent rank, will be appointed. The Supreme Court in Bhagwati Prashad Dixit Ghorewala v Rajiv Gandhi rejected the contention that the CEC should possess qualifications similar to that of a Supreme Court judge, despite being placed on par with them in terms of the removal process."

73. We find that under the caption 'Comparative Practices', the Report contains the following discussion:

> "(ii) Comparative practices 6.11.1 An examination of comparative practices is instructive. In South Africa, the Independent Electoral Commission comprises of five members, including one judge. They are appointed by the President on the recommendations of the National Assembly, following nominations by a National Assembly inter-party committee, which receives a list of at least eight candidates. This list of (at least) eight nominees is recommended by the Selection Committee, which has four members being, the President of the Constitutional Court; a representative of the Human Rights Commission and the Commission on Gender Equality each; and the Public Prosecutor.

6.11.2 In Ghana too, the seven member Election Commission is appointed by the President on the advice of the Council of State, with the Chairman and two Deputy Chairmen having permanent tenure.

6.11.3 In Canada, the Chief Electoral Officer of "Elections Canada" is appointed by a House of Commons resolution for a non-renewable ten- year term, and to protect their independence from the government, he/she reports directly to Parliament. In the United States, the six Federal Election Commissioners are appointed by the President with the advise and consent of the Senate. The Commissioners can be members of a political party, although not more than three Commissioners can be members of the same party.

6.11.4 In all these cases thus, it is clear that the appointment of the Election Commissioners or the electoral officers is a consultative process involving the Executive/ Legislature/other independent bodies."

74. Thereafter, under the caption 'the Recommendation', we find the following:

> "(iii) Recommendations 6.12.1 Given the importance of maintaining the neutrality of the ECI and to shield the CEC and Election Commissioners from executive interference, it is imperative that the appointment of Election Commissioners becomes a consultative process.
>
> 6.12.2 To this end, the Commission adapts the Goswami Committee's proposal with certain modifications. First, the appointment of all the Election Commissioners (including the CEC) should be made by the President in consultation with a three-member collegium or selection committee, consisting of the Prime Minister, the Leader of the Opposition of the Lok Sabha (or the leader of the largest opposition party in the Lok Sabha in terms of numerical strength) and the Chief Justice of India. The Commission considers the inclusion of the Prime Minister is important as a representative of the current government.
>
> 6.12.3 Second, the elevation of an Election Commissioner should be on the basis of seniority, unless the three member collegium/committee, for reasons to be recorded in writing, finds such Commissioner unfit.

6.12.4 Such amendments are in consonance with the appointment process in Lokpal and Lokayuktas Act, 2013, the Right to Information Act, 2005 and the Central Vigilance Commission Act, 2003.

6.12.5 Pursuant to Article 324(2), an amendment can be brought to the existing Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991 to amend the title and insert a new Chapter 1A on the appointment of Election Commissioners and the CEC as follows:

• Act and Short Title: The Act should be renamed the "Election Commission (Appointment and Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991".

• The short title should state, "An Act to determine the appointment and conditions of service of the Chief Election Commissioner and other Election Commissioners and to provide for the procedure for transaction of business by the Election Commission and for matters connected therewith or incidental thereto." • Chapter I-A – Appointment of Chief Election Commissioner and Election Commissioners.

2A. 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 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."

75. In regard to the aspect about the permanent and independent Secretariat of the Election Commission of India, it was noticed that to give effect to the Goswami Committee recommendation, the Constitution Seventieth Amendment Bill, 1990 was introduced on 30.05.1990 and that it was subsequently withdrawn in 1993 in view of the changed composition of the Election Commission of India, on it becoming a multi-Member Body pursuant to the 1991 Act and on the ground that the Bill

needed some amendments. The Bill, however, the Law Commission noticed, was never introduced. Thereafter, the Law Commission referred to the recommendations of the Election Commission itself for seeking appointment of an independent Secretariat. The Law Commission, accordingly, recommended insertion of Article 324(2A), inter alia, providing for a separate, independent and permanent secretarial staff for the Election Commission. In regard to the need for equating the two Election Commissioners with the Chief Election Commissioner and noting that Election Commissioners were clearly superior to the Regional Commissioners, the Law Commission recommended changes in Article 324(5) as well. The amended Article 324, as proposed by the Law Commission of India, in its Report, reads as follows:

> "324. Superintendence, direction and control of elections to be vested in an Election Commission. - (1) 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) (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.
>
> (2A) (1): The Election Commission shall have a separate independent and permanent secretarial staff.
>
> (2) 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.
>
> (3) When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.
>
> (4) Before each general election to the House of the People and to the Legislative Assembly of each State, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).
>
> (5): Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Regional Commissioners shall be such as the President may by rule determine;

Provided that the Chief Election Commissioner and any other 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 and any other Election Commissioner shall not be varied to his disadvantage after his appointment:

> Provided further that a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.
>
> (6) 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 by clause (1)."

76. There is a newspaper Report of The Hindu dated 04.06.2012, which appears to project the demand of Shri L.K. Advani, that a Collegium be put in place for appointment to the Constitutional Body and taking the stand that the present system of appointment did not inspire confidence among the people. There is also a reference to the Report of the Citizens Commission of Elections. It appears to be prepared by the former Judge of this Court Shri Madan B. Lokur and Shri Wajahat Habibullah, a former Chief Information Commissioner. In the said Report, we find the Article 'Are Elections in India Free and Fair' by Shri M.G. Devasahayan. Under the head 'ECI – functioning an autonomy', we find the following criticism:

> " ☐ECI has plenipotentiary powers drawn from Article 324 of the Constitution of India to conduct free and fair election.
>
> ☐In addition, Supreme Court has ruled: "when Parliament or any State Legislature made valid law relating to, or in connection to elections, the Commission, shall act in conformity with, not in violation of such provisions, but where such law is silent, Article 324 is a reservoir of power to act for the avowed purpose of pushing forward a free and fair election with expedition…".
>
> ☐But ECI is just not using such powers, because ECs are the appointees of the Government of the day and not through an independent process of collegium. The case of one dissenting EC, who was side-lined and then eased out has caused irretrievable damage to ECI's independence and integrity! ☐This compromises the autonomy of the ECI and creates doubts about the neutrality of the CEC and the ECs, and consequently, the neutrality of the Commission itself. This poses serious danger to the fairness and integrity of not only the elections, but democracy itself…" (Emphasis supplied)
>
> 77. In the year 2016, we find the following proposed electoral reforms essentially related to Article 324(5), being proposals made by the Election Commission itself.

"Clause (5) of Article 324 of the Constitution provides that the Chief Election Commissioner shall not be removed from his office except in the same manner and on the same grounds as a Judge of the Supreme Court. The Chief Election Commissioner and the two Election Commissioners enjoy the same decision making powers which is suggestive of the fact that their powers are at par with each other.

However, Clause (5) of Article 324 of the Constitution 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 reason for giving protection to a Chief Election Commissioner as enjoyed by a Supreme Court Judge in matters of removability from office was in order to ensure the independence of Commission from external pulls and pressure. However, the rationale behind not affording similar protection to other Election Commissioners is not explicable. The element of 'independence' sought to be achieved under the Constitution is not exclusively for an individual alone but for the whole institution. Thus, the independence of the Commission can only be strengthened if the Election Commissioners are also provided with the same protection as that of the Chief Election Commissioner.

Proposed amendment The present constitutional guarantee is inadequate and requires an amendment to provide the same protection and safeguard in the matter of removability of Election Commissioners as is available to the Chief Election Commissioner." Q. SEPARATION OF POWERS AND JUDICIAL ACTIVISM

78. In I. C. Golak Nath and Others v. State of Punjab and Another,15 Justice Subba Rao held speaking for this Court:

> "It (the Constitution) demarcates their jurisdiction minutely and expects them to exercise their respective powers without overstepping their limits. They should function within the spheres allotted to them. No authority created under the Constitution is supreme; the Constitution is supreme and all the authorities function under the supreme law of the land."

79. What is this jurisdiction which is demarcated? Justice R.S.Pathak speaking for the Bench in Bandhua Mukti Morcha v. Union of India and Others16 held:

> "It is a common place that while the Legislature enacts the law the Executive implements it and the Court interpret it and, in doing so, adjudicates on the validity of executive action and, under our Constitution, even judges the validity of the legislation itself." The question would arise as to whether the powers/functions are cast in stone or whether the 15AIR 1967 SC 1643 (1984) 3 SCC 161 aforesaid powers/functions can legitimately be exercised/discharged by the other organs. We may in this regard again advert to what this Court held in the aforesaid case (supra):

> "And yet it is well recognized that in a certain sphere the Legislature is possessed of judicial power, the executive possesses a measure of both legislative and judicial functions, and the court, in its duty of interpreting the law, accomplishes in its perfect action in a marginal degree of legislative exercise. Nonetheless a fine and delicate balance is envisaged under our Constitution between these primary institutions of the State."

80. The High Courts and this Court make Rules under the power granted to them. No doubt, they will be acting as delegates of the Legislature but the exercise of power in such cases would be legislative in nature. When an Ordinance is made under Article 123 by the Executive, that is, the Union of India, it is a case of the Executive exercising legislative power. When Parliament adjudges a man guilty of contempt of itself and punishes him, the proceedings are informed by the attribute of judicial power.

81. It cannot be disputed that there is no strict demarcation or separation of powers in India unlike the position obtaining in the United States of America and Australia. (See In Re. Delhi Laws Act, 191217). The doctrine of separation of powers, no doubt, has been eloquently expounded by Montesquieu in his work "The Spirit of Laws" and the basis on which it rests is the imperative need to avoid concentration of power in one or two organs. Undoubtedly, an observance of doctrine of separation of powers has been traced to the principle of equality (See Madras Bar Association v. Union of India18. Justice Y.V. Chandrachud, as His Lordship then was, speaking in Indira Nehru Gandhi v. Raj Narain & Ors.19 held inter alia as follows:

> "But the principle of separation of powers is not a magic formula for keeping the three organs of the State within the strict confines of their functions."

82. Separation of powers as understood as prevailing in India constitutes a part of the basic structure of AIR 1951 SC 332 2021 SCC OnLine SC 463 (1975) Suppl. SCC 1 the Constitution of India (See His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Another20) and I.R. Coelho (Dead) by LRs v. State of T.N.21

83. In Indian Aluminium Co. and others v. State of Kerala and others22, this Court, while dealing with the alleged encroachment by the Legislature of the boundaries set by the Doctrine of Separation of Powers laid down, inter alia, as follows:

> "(1) The adjudication of the rights of the parties is the essential judicial function. Legislature has to lay down the norms of conduct or rules which will govern the parties and the transactions and require the court to give effect to them;
>
> (2) The Constitution delineated delicate balance in the exercise of the sovereign power by the legislature, executive and judiciary;
>
> (3) In a democracy governed by the rule of law, the legislature exercises the power under Articles 245 and 246 and other companion articles read with the entries in the

> respective lists in the Seventh Schedule to make the law which includes power to amend the law.
>
> (4) Courts in their concern and endeavour to preserve judicial power equally must be guarded to maintain the delicate balance devised by the 4 SCC 225 (2007) 2 SCC 1 (1996) 7 SCC 637 Constitution between the three sovereign functionaries. In order that the rule of law permeates to fulfil constitutional objectives of establishing an egalitarian social order, the respective sovereign functionaries need free play in their joints so that the march of social progress and order remains unimpeded.

The smooth balance built with delicacy must always be maintained;"

84. Apart from the power to make subordinate legislation as a delegate of the Legislature, do the superior courts make law or is it entirely tabooed? In other words, when the court decides a lis, is the function of the court merely to apply law to the facts as found or do courts also make law? The theory that the courts cannot or do not make laws is a myth which has been exploded a long while ago. We may only in this regard refer to what Justice S.B. Sinha opined on behalf of this Court in the decision reported in State of U.P. v. Jeet S. Bisht23:

> "77. Separation of powers is a favourite topic for some of us. Each organ of the State in terms of the constitutional scheme performs one or the other functions which have been assigned to the other organ. Although drafting of legislation and its implementation by and large (2007) 6 SCC 586 are functions of the legislature and the executive respectively, it is too late in the day to say that the constitutional court's role in that behalf is non-existent. The judge-made law is now well recognised throughout the world. If one is to put the doctrine of separation of power to such a rigidity, it would not have been possible for any superior court of any country, whether developed or developing, to create new rights through interpretative process.

78. Separation of powers in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. Constitutional mandate sets the dynamics of this communication between the organs of polity. Therefore, it is suggested to not understand separation of powers as operating in vacuum. Separation of powers doctrine has been reinvented in modern times.

83. If we notice the evolution of separation of powers doctrine, traditionally the checks and balances dimension was only associated with governmental excesses and violations. But in today's world of positive rights and justifiable social and economic entitlements , hybrid administrative bodies, private functionaries discharging public functions, we have to perform the oversight function with more urgency and enlarge the field of checks and balances to include governmental inaction. Otherwise we envisage the country getting transformed into a state of repose. Social engineering as well as institutional engineering therefore forms part of this obligation." (Emphasis supplied)

85. Separation of powers is part of the basic structure of the Constitution of India. Equally, judicial review has been recognised as forming a part of the basic structure. Judicial review of legislation is expressly provided in Article 13 of the Constitution. A court when it declares a law made by the legislature as unconstitutional, if it be that, it is within its bounds, cannot be accused of transgressing the principle of separation of powers. Declaring even a law made by the Parliament as unconstitutional forms a part of its powers. In view of the enunciation of the doctrine of basic structure in India unlike perhaps in most countries, even an amendment to the Constitution can be declared unconstitutional by the court. Such exercise cannot expose the court to the charge that it is not observing the limits set by the Constitution.

86. While it may be true that the Constitution is supreme and all disputes must finally attain repose under the aegis of the Constitution, in one sense the final arbiter of what is the law must be the court. While it may be true that by removing the text forming the premise for a judicial verdict, the lawgiver may revisit the judgment, it is not open to the legislature to don the robes of a Judge and arrogate to itself the judicial function. The theory of separation of powers in an ultimate analysis is meant to prevent tyranny of power flowing from the assumption of excess power in one source. Its value lies in a delicate but skilful and at the same time legitimate balance being struck by the organs of the State in the exercise of their respective powers. This means that the essential powers which are well understood in law cannot be deliberately encroached upon by any organ of the State.

87. Creative judicial activism has been a subject of both controversy reaching brickbats as also bouquets to the courts. Under the Constitution which clothes both citizens and persons with fundamental rights besides tasking the State with the achieving of goals declared in the Directive Principles, judicial activism as opposed to a mere passive role may be the much- needed choice. Judicial activism, however, must have a sound juridical underpinning and cannot degenerate into a mere exercise of subjectivism.

88. The learned Solicitor General is right therefore that judicial restraint may be a virtue in the elevated region of constitutional law. Being the grundnorm, it is indeed a rarefied field where the court must tread wearily (See Divisional Manager, Aravali Golf Club and Another v. Chander Hass and Another24). This Court indeed has admonished against the court itself running the Government. In Asif Hameed v. State of J & K,25 no doubt this court refers to the following observations of Frankfurter, J. in para 18:

> “All power is, in Madison's phrase, “of an encroaching nature”. Judicial power is not immune against this human weakness. It also must be on guard against encroaching beyond its proper bounds, and not the less so since the only restraint upon it is self-restraint....
>
> Rigorous observance of the difference between limits of power and wise exercise of power — between questions of authority and questions of prudence — requires the most alert appreciation of this decisive but subtle relationship of two concepts that too easily (2008) 1 SCC 683 (1989) Suppl.2 SCC 364 coalesce. No less does it require a disciplined will to adhere to the difference. It is not easy to stand aloof and allow

> want of wisdom to prevail to disregard one's own strongly held view of what is wise in the conduct of affairs.

But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the executive branch do."

89. In the work "Judicial Activism" in India by SP Sathe, the learned author in the chapter 'Legitimacy of Judicial Activism' observes: -

> "Legitimacy of Judicial Activism The realist school of jurisprudence exploded the myth that the judges merely declared the pre-existing law or interpreted it and asserted that the judges made the law. It stated that the law was what the courts said it was. This is known as legal scepticism and was really a reaction to Austin's definition of law as a command of the political sovereign. According to analytical jurisprudence a court merely found the law or merely interpreted the law. The American realist school or jurisprudence asserted that the judges made law, though interstitially. Jerome Frank, Justice Holmes, Cardozo, and Llewellyn were the chief exponents of this school. The Indian Supreme Court not only makes law, as understood in the sense of the realist jurisprudence, but actually has started 'legislating' exactly in the way in which a legislature legislates. Judicial law-
>
> making in the realist sense in what the Court does when it expands the meanings of the words 'personal liberty' or 'due process of law' or 'freedom of speech and expression'. When the Court held that a commercial speech (advertisement) was entitled to the protection of freedom of speech and expression, it was judicial law-making in the realist sense. Similarly, the basic structure doctrine or the parameters for reviewing the President's action under article 356 or the wider meanings of the words 'life', 'liberty', and 'procedure established by law' in article 21 of the Constitution by the Supreme Court are instances of judicial law-making in the realist sense. When, however, the Court lays down guidelines for inter-country adoption, against sexual harassment of working women at the workplace, or for abolition of child labour, it is not judicial law-making in the realist sense these are instances of judicial excessivism that fly in the face of the doctrine of separation of powers. The doctrine of separation of powers envisages that the legislature should make law, the executive should execute it, and the judiciary should settle disputes in accordance with the existing law. In reality such watertight separation exists nowhere and is impracticable. Broadly it means that one organ of the State should not perform a function that essentially belongs to another organ. While law-making through interpretation and expansion of the meanings of open-textured expressions such as 'due process of law', 'equal protection of law', or 'freedom of speech and expression' is a legitimate judicial function, the making of an entirely new law, which the Supreme

> Court has been doing through directions in the above-mentioned cases, is not a legitimate judicial function. True, the Court has not supplanted but has merely supplemented the legislature through such directions. It has said in each case that it legislated through directions only because no law existed to deal with situations such as inter-country adoption or sexual harassment of working women and that its direction could be replaced by legislation of the legislature."

90. In the work, "The Nature of the Judicial Process" by Benjamin N. Cardozo, in the lecture, "The Method of Sociology - The Judge as a Legislator." Justice Cardozo observes under the following subject: -

> "THE JUDGE AS A LEGISLATOR ...No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law. How far he may go without travelling beyond the walls of the interstices cannot be staked out for him upon a chart. He must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art. Even within the gaps, restrictions not easy to define, but felt, however impalpable they may be, by every judge and lawyer, hedge and circumscribe his action. They are established by the traditions of the centuries, by the example of other judges, his predecessors and his colleagues, by the collective judgment of the profession, and by the duty of adherence to the pervading spirit of the law.
>
> ...The process, being legislative, demands the legislator's wisdom.
>
> ...Customs, no matter how firmly established, are not law, they say, until adopted by the courts. Even statues are not law because the courts must fix their meaning. That is the view of Gray in his "Nature and Sources of the Law." "The true view, as I submit," he says, "is that the Law is what the Judges declare; that statues, precedents, the opinions of learned experts, customs and morality are the sources of the Law." So, Jethro Brown in a paper on "Law and Evolution," tells us that a statue, till construed, is not real law. It is only "ostensible" law, Real law, he says, is not found anywhere except in the judgment of a court... ..They have the right to legislate within gaps, but often there are no gaps. We shall have a false view of the landscape if we look at the waste spaces only, and refuse to see the acres already sown and fruitful..
>
> ..The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains." (Emphasis Supplied)

91. Close to the aspect of separation of powers, is controversial subject of judicial activism. In the work "Judicial Activism, Authority, Principles and Policy in The Judicial Method" by Hon'ble Justice Michael Kirby, we find of particular interest, the following:

> "The acute needs of the developing countries of the Commonwealth have sometimes produced an approach to constitutional interpretation that is unashamedly described as "activist", including by judges themselves. Thus in India, at least in most legal circles, the phrase "judicial activism" is not viewed as one of condemnation. So urgent and numerous are the needs of that society that anything else would be regarded by many – including many judges and lawyers – as an abdication of the final court's essential constitutional role.
>
> One instance may be cited from Indian experience: the expansion of the traditional notion of standing to sue in public interest litigation. The Indian Supreme Court has upheld the right of prisoners, the poor and other vulnerable groups to enlist its constitutional jurisdiction by simply sending a letter to the Court. This might not seem appropriate in a developed country. Yet it appears perfectly adapted to the nation to which the Indian Constitution speaks. Lord Chief Justice Woolf recently confessed to having been astounded at first by the proactive approach of the Indian Supreme Court in this and other aspects. However, he went on:
>
> "...I soon realised that if that Court was to perform its essential role in Indian society, it had no option but to adopt the course it did and I congratulate it for the courage it has shown."" (Emphasis Supplied)

92. Unlike demands of a formal democracy, the hallmark of a substantive democracy and if we may say so, a liberal democracy must be borne in mind. Democracy is inextricably intertwined with power to the people. The ballot, is more potent than the most powerful gun. Democracy facilitates a peaceful revolution at the hands of the common man if elections are held in a free and fair manner. Elections can be conflated with a non- violent coup capable of unseating the most seemingly powerful governing parties, if they do not perform to fulfil the aspirations of the governed. Democracy is meaningful only if the sublime goals enshrined in the preamble to the Constitution receive the undivided attention of the rulers, namely, social, political and economic justice. The concepts of liberty, equality and fraternity must not be strange bedfellows to the ruling class. Secularism, a basic feature of the Constitution must inform all actions of the State, and therefore, cannot be spurned but must be observed in letter and spirit. Democracy can be achieved only when the governing dispensation sincerely endeavours to observe the fundamental rights in letter and spirit. Democracy also, needless to say, would become fragile and may collapse, if only lip service is paid to the rule of law. We cannot be oblivious to the fact that the founding fathers have contemplated that not only must India aspire for a democratic form of government and life but it is their unambiguous aim that India must be a Democratic Republic. The conventional definition of a 'Republic' is that it is a Body Polity, in which, the Head of State is elected. However, the republican character of our democracy also means that the majority abides by the Constitution ensuring rights granted under it and also pursues goals enshrined in it. A brute majority generated by a democratic

process must conform to constitutional safeguards and the demands of constitutional morality. A Democratic Republic contemplates that majoritarian forces which may be compatible with a democracy, must be counter balanced by protection accorded to those not in the majority. When we speak about the minority, the expression is not to be conflated with or limited to linguistic or religious minorities. These are aspects which again underly the need for an independent election commission.

93. It may be true that the resort to courts is not a remedy for all ills in a society (see Common Cause v. Union of India and Others26) We are equally cognizant that the courts must not try to run a Government nor behave like emperors. We also take notice of the following words of this Court in Divisional Manager, Aravali Golf Club and Another v. Chander Hass and Another,27 where the merit of exercising judicial restraint has been emphasized.

“33. Judicial restraint is consistent with and complementary to the balance of power among the three independent branches of the State. It accomplishes this in two ways. First, judicial restraint not only recognises the equality of the other two branches with the judiciary, it also fosters that equality by minimising inter- branch interference by the judiciary. In this analysis, judicial restraint may also be called judicial respect, that is, respect by the judiciary for the other coequal branches. In contrast, judicial activism's unpredictable results make the judiciary a moving target and thus decreases the ability to maintain equality with the co-branches. Restraint stabilises the judiciary so that it may better function in a system of inter-branch equality.” (1996) 1 SCC 753 (2008) 1 SCC 683 “34. Second, judicial restraint tends to protect the independence of the judiciary. When courts encroach into the legislative or administrative fields almost inevitably voters, legislators and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators or administrators it follows that judges should be elected like legislators or selected and trained like administrators. This would be counterproductive. The touchstone of an independent judiciary has been its removal from the political or administrative process. Even if this removal has sometimes been less than complete, it is an ideal worthy of support and one that has had valuable effects.” “38. The moral of this story is that if the judiciary does not exercise restraint and overstretches its limits there is bound to be a reaction from politicians and others. The politicians will then step in and curtail the powers, or even the independence, of the judiciary (in fact the mere threat may do, as the above example demonstrates). The judiciary should, therefore, confine itself to its proper sphere, realising that in a democracy many matters and controversies are best resolved in non-judicial setting.” However, we may also listen to the following words.

“39. We hasten to add that it is not our opinion that judges should never be “activist”. Sometimes judicial activism is a useful adjunct to democracy such as in the School Segregation and Human Rights decisions of the US Supreme Court vide Brown v. Board of Education [347 US 483 : 98 L Ed 873 (1954)], Miranda v. Arizona [384 US 436 : 16 L Ed 2d 694 (1966)], Roe v. Wade [410 US 113 : 35 L Ed 2d 147 (1973)] , etc. or the decisions of our own Supreme Court which expanded the scope of Articles 14 and 21 of the Constitution. This, however, should be resorted to only in exceptional circumstances when the situation forcefully demands it in the interest of the nation or the poorer and weaker sections of society but always keeping in mind that ordinarily the task of legislation or administrative decisions is for the legislature and the executive and not the judiciary.” (Emphasis

Supplied)

94. A Constitution Bench Judgment reported in State of T.N. v. State of Kerala and another28 summarised its conclusions on the constitutional principles relating to separation of powers as follows:

> "126.1. Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India. The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law. In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent (2014) 12 SCC 696 from the scheme of Indian Constitution.

Constitution has made demarcation, without drawing formal lines between the three organs—legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of powers, the separation of powers between the legislature, executive and judiciary is not different from the Constitutions of the countries which contain express provision for separation of powers. 126.2. Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution. Separation of judicial power is a significant constitutional principle under the Constitution of India. 126.3. Separation of powers between three organs—the legislature, executive and judiciary—is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality under Article

14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality under Article 14 of the Constitution." R. IS THE RIGHT TO VOTE A STATUTORY RIGHT OR A CONSTITUTIONAL RIGHT?

95. The right to vote is not a civil right. A Bench of six learned Judges in N.P. Ponnuswami v. Returning_Officer, Namakkal,29 in the context of Article 329(b) held that the right to vote was a creature of a statute or a special law and must be subject to limitations imposed by it. The matter arose from a challenge to the rejection of the nomination maintained in a writ petition and the question which substantially arose was the impact of Article 329(b). No doubt, the court examined Part XV of the Constitution and about Articles 325 and 326, the Court held as follows:

> "The other two Articles in Part XV i.e. Article 325 and 326 deal with two matters of principle to which the Constitution framers have attached much importance. They are (1) Prohibition against dis crimination in the preparation of, or eligibility for inclusion in, the electoral rolls, on grounds of religion, race, caste, sex or any of them; and (2) adult sufferage." The Court really was not concerned with the question as to whether Article 326 provided for a Constitutional right to vote.

96. In Jyoti Basu and Others. Debi Ghosal and Others30, the Court was dealing with a challenge to the High 29 AIR 1952 SC 64 30 1982 (1) SCC 691 court rejecting an application in an Election

Petition to strike out the names of certain parties from the array of parties. The Court inter alia held that Article 326 provides for elections to be held on the basis of adult franchise. Thereafter, the Court held as follows:

> "7. The nature of the right to elect, the right to be elected and the right to dispute an election and the scheme of the constitutional and statutory provisions in relation to these rights have been explained by the Court in N.P. Ponnuswami v. Returning Officer, Namakkal Constituency [(1952) 1 SCC 94 : AIR 1952 SC 64 : 1952 SCR 218 : 1952 SCJ 100] and Jagan Nath v. Jaswant Singh [AIR 1954 SC 210 : 1954 SCR 892 : 1954 SCJ 257] . We proceed to state what we have gleaned from what has been said, so much as necessary for this case.
>
> 8. 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 an election." (Emphasis supplied)
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> 97. Mohan Lal Tripathi vs. District Magistrate, Raibraally and others31 was a case wherein the appellant who was elected directly under Section 43 of the U.P. Municipalities Act was removed by a no-confidence motion. It was his contention that his removal was undemocratic as it was sought to be done by a smaller and different body than the one that elected him. It is in these facts that the court inter alia held as follows:
>
> "..But electing representatives to govern is neither a 'fundamental right' nor a 'common right' but a special right created by the statutes or a 'political right' or 'privilege' and not a 'natural[', absolute' or 'vested right'.
>
> This Court was not dealing with the impact of Article 326. It followed the judgement in N.P. Ponnuswamy (supra).
>
> 98. In Rama Kant Pandey v. Union of India32, a Bench of three learned judges was dealing with a petition challenging the validity of the Representation of the People (Amendment Ordinance) Act, 1992 on the ground

31 (1992) 4 SCC 80 32 (1993) 2 SCC 438 of violation of Articles 14, 19 and 21. Section 52 providing for countermanding of polls was amended. It was in the context of the said challenge, the Court noted that the right to vote or to stand as a candidate for election was neither a fundamental nor civil right. It purported to follow the views which originated in Ponnuswamy case (supra).

99. In Anukul Chandra Pradhan, Advocate Supreme Court v. Union of India and others33, a Bench of three learned Judges, while dealing with a challenge to Section 62(5) of the 1951 Act, on the ground that it violated Article 14 and 21 of the Constitution, upheld Section 62(5). We may only

notice the following views expressed by the Court:

> "5. There are provisions made in the election law which exclude persons with criminal background of the kind specified therein, from the election scene as candidates and voters. The object is to prevent criminalisation of politics and maintain probity in elections. Any provision enacted with a view to promote this object must be welcomed and upheld as subserving the constitutional purpose. The elbow room available to the legislature in classification depends on the context and the object for enactment of the provision. The existing conditions in which the law has to be 33 (1997) 6 SCC 1 applied cannot be ignored in adjudging its validity because it is relatable to the object sought to be achieved by the legislation.

Criminalisation of politics is the bane of society and negation of democracy. It is subversive of free and fair elections which is a basic feature of the Constitution. Thus, a provision made in the election law to promote the object of free and fair elections and facilitate maintenance of law and order which are the essence of democracy must, therefore, be so viewed. More elbow room to the legislature for classification has to be available to achieve the professed object."

100. The Court also found other reasons to justify the provision. It was noted that permitting every person in prison to vote, would lead to a resource crunch in terms of police force required to facilitate the right. The Court also went on to hold that the Right to Vote is also subject to limitations imposed by the Statute. The specific question, as to whether it constituted a Constitutional Right under Article 326, as such, was not presented for adjudication.

101. In Shyamdeo Pd. Singh v. Nawal Kishore Yadav34, a Bench of three learned judges while dealing with a case 34 (2000) 8 SCC 46 arising out of an election petition had this to say about Article 326:

> "9. Article 326 of the Constitution is founded on the doctrine of adult suffrage. It provides that every person who is a citizen of India and who is not less than 18 years of age on such date as may be fixed in that behalf by or under any law made by the appropriate legislature and is not otherwise disqualified under the Constitution or any law made by the appropriate legislature on the ground of non- residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election. This Article clearly contemplates law being enacted by an appropriate legislature providing for qualifications and disqualifications subject to which a citizen of India not less than 18 years of age shall be entitled to be registered as a voter and exercise his right to franchise. Article 327 provides for law being made by Parliament subject to the provisions of the Constitution with respect to all matters relating to or in connection with elections to either House of Parliament or to the House or either House of the Legislature of a State which law may include provisions for the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.

102. The Court, inter alia, after referring to Section 62 of the 1951 Act, held as follows:

"... A person who is not entered in the electoral roll of any constituency is not entitled to vote in that constituency though he may be qualified under the Constitution and the law to exercise the right to franchise. To be entitled to cast a ballot the person should be entered in the electoral roll..." It was further held:

"15. A perusal of the abovesaid provisions leads to certain irresistible inferences. Article 326 of the Constitution having recognised the doctrine of adult suffrage has laid down constitutional parameters determinative of the qualifications and disqualifications relating to registration as a voter at any election. The two Articles, i.e., Article 326 and Article 327 contemplate such qualifications and disqualifications being provided for, amongst other things, by the appropriate legislature. The fountain source of the 1950 Act and the 1951 Act enacting provisions on such subject are the said two Articles of the Constitution. The provisions of Section 16 of the 1950 Act and Section 62 of the 1951 Act read in juxtaposition go to show that while Section 16 of the 1950 Act provides for "disqualifications for registration" in an electoral roll, (qualifications having been prescribed by Section 27 thereof), Sections 62 of the 1951 Act speaks of "right to vote" which right is to be determined by reference to the electoral roll of the constituency prepared under the 1950 Act. The eligibility for registration of those enrolled having been tested by reference to Section 16 or Section 27 of the Act, as the case may be, and the electoral roll having been prepared, under the 1950 Act if a person is or becomes subject to any of the disqualifications provided in clauses (a), (b) and (c) of sub- section (1) of Section 16, two consequences may follow. His name may forthwith be struck off the electoral roll, in which the name is included, under sub-section (2) of Section 16 of the 1950 Act. Even if the name is not so struck off yet the person is disqualified from exercising right to vote at the election by virtue of sub-section (2) of Section 62 of the 1951 Act. The qualifications prescribed for enrolment in the electoral roll as provided by clause (b) of sub-section (5) of Section 27 of the 1950 Act are: (i) ordinary residence in a teachers' constituency, (ii) being engaged in the relevant educational institution for a total period of at least three years within the six years immediately before the qualifying date. The inquiry into availability of these eligibility qualifications, under the Scheme of the 1950 Act is to be made at the time of preparation of the electoral roll or while entering or striking out a name in or from the electoral roll. Section 62 of the 1951 Act does not provide that a person who is not qualified to be enrolled as an elector in the electoral roll shall not be entitled to vote at the election. To put it briefly a disqualification under Section 16 of the 1950 Act has a relevance for and a bearing on the right to vote under Section 62 of the 1951 Act but being not qualified for enrolment in the electoral roll under Section 27 of the 1950 Act has no relevance for or bearing on the right to vote at an election under Section 62 of the 1951 Act. That is the distinction between a "disqualification" and "not being qualified".

> It is, however, relevant to notice that the case arose from a challenge to the result of an election held to a legislative council and Section 27 referred to dealt with legislative councils and not legislative assemblies.
>
> 103. In Union of India v. Assn. for Democratic Reforms35, the High Court gave certain directions to the Election Commission on the basis that the right of the voter to make the right choice depended upon the availability of information about the past of the candidates and it must be disclosed to the voters. This Court found that for the health of democracy and fair elections and for ensuring the purity of elections and having regard to the width of the jurisdiction of the Election Commission under Article 324 (1) of the Constitution, the directions given by the High court was justified.

This Court however issued certain directions which modified the directions of the High Court. It is in the context of these facts, the Court, inter alia, held as follows:

> "46 (7). Under our Constitution, Article 19(1)(a) provides for freedom of speech and expression. Voter's speech or expression in case of election would include casting of votes, that is to say, voter speaks out or expresses by casting vote. For this purpose, information about the candidate to be selected is a must. Voter's (little man — citizen's) right to know antecedents including criminal past of his candidate contesting election for

35 (2002) 5 SCC 294 MP or MLA is much more fundamental and basic for survival of democracy. The little man may think over before making his choice of electing law-breakers as law-makers."

104. The directions led to the insertion of Sections 33A and 33B. Under Section 33B, it was inter alia provided that notwithstanding any judgment, no candidate was liable to disclose or furnish any such information in respect of his election which is not required to be disclosed or furnished under the Representation of the People Act, 1951 or the rules made thereunder. In People's Union for civil Liberties (PUCL) and Another vs. Union of India and Another36 Justice M.B. Shah while dealing with the nature of the right to vote, inter alia held that "the right of the voter to know the bio data of the candidate was the foundation of democracy". It was concluded by the learned judge that Section 33B of the amended Act was illegal and invalid. Justice P. Venkatarama Reddi in the same case went on hold as follows:

> "With great reverence to the eminent Judges, I would like to clarify that the right to vote, if not a fundamental right, is certainly a 36 (2003) 4 SCC 399 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 the RP 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 the People and Legislative Assemblies. It is not very accurate to describe it as a statutory right, pure and simple. Even with this clarification, the argument of the learned

> Solicitor-General that the right to vote not being a fundamental right, the information which at best facilitates meaningful exercise of that right cannot be read as an integral part of any fundamental right, remains to be squarely met.

Here, a distinction has to be drawn between the conferment of the right to vote on fulfilment 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." (Emphasis supplied) Justice D.M. Dharmadhikari also agreed with the following conclusion No.2 at para 123 which contains the judgment of Justice P. Venkatarama Reddi:

> "(2) The right to vote at the elections to the House of the People or Legislatives 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."

105. In Kuldip Nayar and Others v. Union of India and Others37, the question which actually fell for consideration was the validity of a certain amendment which came into force on 28.08.2003. By the Amendment, the requirement of domicile in the State concerned for being elected to the Council of States was deleted. The Constitution Bench in the course of its judgment referred to PUCL (supra) and the court observed as follows:

> 37 (2006) 7 SCC 1 "361. The argument of the petitioners is that the majority view in People's Union for Civil Liberties [(2003) 4 SCC 399] , 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.
>
> 362. 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 [(1982) 1 SCC 691] 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.

363. 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."

106. It will be noticed that the Council of States is not the same as the House of the People within the meaning of Article 326. We cannot overlook the following observations:

> "448. It shows that the right to vote in "free and fair elections" is always in terms of an electoral system prescribed by national legislation. The right to vote derives its colour from the right to "free and fair elections"; that the right to vote is empty without the right to "free and fair elections". It is the concept of "free and fair elections" in terms of an electoral system which provides content and meaning to the "right to vote". In other words, "right to vote" is not (sic) an ingredient of the free and fair elections. It is essential but not the necessary ingredient."

107. In K. Krishna Murthy v. Union of India38, a Constitution Bench was dealing with the constitutional validity of certain aspects of the reservation policy in regard to the composition of elected local self- government institutions. The Bench relied upon M.M. Tripathi case (supra) and observed as follows:

> "..It is a well-settled principle in Indian Law, that the right to vote and contest elections does not have the status of fundamental rights. Instead, they are in the nature of legal rights which can be controlled though legislative means..."

108. The request of the petitioner therein to reconsider the precedent wherein the right of political 38 (2010) 7 SCC 202 participation was categorised as statutory right was turned down. No doubt, this case was not dealing with elections to the House of the People or the State Legislature.

109. In People's Union for Civil Liberties v. Union of India39, [the second PUCL case], a Bench of three learned Judges recognised the right of the person to express his disapproval of the candidates who stood for election by pressing a button which would indicate 'none of the above' (NOTA). In the course of this judgment dealing with the first PUCL judgment (supra), the Court held as follows:

> "After a careful perusal of the verdicts of this Court in Kuldip Nayar [(2006) 7 SCC 1], Assn. for Democratic Reforms [(2002) 5 SCC 294] and People's Union for Civil Liberties [(2003) 4 SCC 399] , we are of the considered view that Kuldip Nayar [(2006) 7 SCC 1] does not overrule the other two decisions rather it only reaffirms what has already been said by the aforesaid two decisions. The said paragraphs recognise that right to vote is a statutory right and also in People's Union for Civil Liberties [(2003) 4 SCC 399] it was held that "a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression". Therefore, it cannot be said 39 (2013) 10 SCC 1 that Kuldip Nayar [(2006) 7 SCC 1]

has observed anything to the contrary. In view of the whole debate of whether these two decisions were overruled or discarded because of the opening line in para 362 of Kuldip Nayar [(2006) 7 SCC 1] i.e. “We do not agree with the above submissions” we are of the opinion that this line must be read as a whole and not in isolation. The contention of the petitioners in Kuldip Nayar [(2006) 7 SCC 1] was that majority view in People's Union for Civil Liberties [(2003) 4 SCC 399] held that right to vote is a constitutional right besides that it is also a facet of the fundamental right under Article 19(1)(a) of the Constitution. It is this contention on which the Constitution Bench did not agree too in the opening line in para 362 and thereafter went on to clarify that in fact in People's Union for Civil Liberties [(2003) 4 SCC 399], a fine distinction was drawn between the right to vote and the freedom of voting as a species of freedom of expression. Thus, 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. With the above observation, we hold that there is no doubt or confusion persisting in the Constitution Bench judgment of this Court in Kuldip Nayar [(2006) 7 SCC 1] and the decisions in Assn. for Democratic Reforms [(2002) 5 SCC 294] and People's Union for Civil Liberties [(2003) 4 SCC 399] do not stand impliedly overruled.” (Emphasis supplied) S. ARTICLE 326 DEMYSTIFIED

110. Article 326 reads as follows:

> “326. 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 person who is a citizen of India and who is not less than 2 [eighteen years] of age on such date as may be fixed in that 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 non- residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election.”

111. It is necessary to notice Articles 327 and 328:

> “327. Power of Parliament to make provision with respect to elections to Legislatures.— Subject to the provisions of this Constitution, Parliament may from time to time by law make provision with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the House or either House of the Legislature of a State including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of such House or Houses.” “328. Power of Legislature of a State to make provision with respect to elections to such Legislature.—Subject to the provisions of this Constitution and in so far as provision in that behalf is not made by Parliament,

> the Legislature of a State may from time to time by law make provision with respect to all matters relating to, or in connection with, the elections to the House or either House of the Legislature of the State including the preparation of electoral rolls and all other matters necessary for securing the due constitution of such House or Houses."

112. We may proceed to decode Article 326. In the first part, the Constitution provides that election to the House of the People and to the Legislative Assembly of every State, shall be on the basis of adult suffrage. This is followed by the words, which is intended to expound what 'adult suffrage' means. The Founding Fathers have, in unmistakable terms, declared that elections to the two Legislative Bodies in question, shall be thrown open to participation to every person, who is:

I.

a) A citizen of India;

b) Is not less than eighteen years of age. The condition must be fulfilled as regards the qualification with reference to 'such date';

II. 'Such date' is to be as specified in or under a law made by the appropriate Legislature. The appropriate Legislature would mean, Parliament in the case of elections to the House of People and the Legislative Assembly of the concerned State, in the case of the Legislative Assembly; III. The person, who is a citizen and not less than eighteen years as on the date as indicated in the law, as aforesaid, Article 326 continues to declare must not be disqualified under the Constitution or any law made by the appropriate Legislature.

IV. The appropriate Legislature can make a law providing for a disqualification, however, only as provided in Article 326 itself. In other words, Article 326 has limited the power of the Legislature concerned in the matter of stipulating disqualifications. What are those disqualifications, which can be stipulated by a law?

V. The disqualifications, which can be provided by a law are as follows:

a. Non-residence;

b. Unsoundness of mind;

c. Crime;

d. Corrupt practice;

e. Illegal practice;

> VI. Moving forward, and proceeding on the basis that a person is a citizen and is not less than eighteen years on the relevant date and is not disqualified in terms of what we have indicated just herein before, viz., under any of the grounds indicated as 'a' to 'e', then Article 326 declares that such person shall be entitled to be registered as a voter at any such election.

The words 'any such election' would mean elections either to the House of the People or the House of the Legislative Assembly. We again reiterate that all conditions being present, as we have referred to with reference to Article 326, the person becomes entitled to be registered as a voter.

113. Accordingly, it is that Parliament enacted in 1950, The Representation of Peoples Act, 1950 (hereinafter referred to as 'the 1950 Act'). Part III provides for electoral rolls for Assembly Constituencies. Section 14(b), as substituted w.e.f. 01.03.1956, defines 'qualifying date':

> ""Qualifying date", in relation to the preparation or revision of every electoral roll under this Part, means the 1st day of January of the year in which it is so prepared or revised:"

> 114. We are omitting reference to the proviso as it related only to the year 1989. Section 15 of the 1950 Act declares that for every constituency, there must be an electoral roll prepared under the said Act under the supervision, direction and control of the Election.

Section 16 provides as follows:

> "16. Disqualifications for registration in an electoral roll.—(1) A person shall be disqualified for registration in an electoral roll if he—
>
> (a) is not a citizen of India; or
>
> (b) is of unsound mind and stands so declared by a competent court; or
>
> (c) is for the time being disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections.
>
> (2) The name of any person who becomes so disqualified after registration shall forthwith be struck off the electoral roll in which it is included:
>
> Provided that the name of any person struck off the electoral roll of a constituency by reason of a disqualification under clause (c) of sub-
>
> section (1) shall forthwith be re-instated in that roll if such disqualification is, during the period such roll is in force, removed under any law authorising such removal."

115. With effect from 30.12.1958, Section 19 of the 1950 Act reads as follows:

"19. Conditions of registration. — Subject to the foregoing provisions of this Part, every person who —

(a) is not less than eighteen years of age on the qualifying date, and

(b) is ordinarily resident in a constituency, shall be entitled to be registered in the electoral roll for that constituency."

116. It will be clear, therefore, that the requirement of minimum age of eighteen years, as provided in Article 326, is to be determined with reference to such date, as may be fixed by or under any law, is to be understood as the qualifying date and it is to be understood as the 1st day of January of the year, in which the electoral roll is prepared or revised.

117. Section 20 deals with the meaning of 'ordinarily resident'. It provides for various circumstances in which a person shall not be deemed to be ordinarily resident as also circumstances in which he is deemed to be ordinarily resident. Article 326 read with the provisions in the 1950 Act, which we have indicated, together provide the disqualifications for a person to be not included in an electoral roll. Before the deletion of the words 'and illegal' in Section 16(c), it provided for corrupt and illegal practices, which were relatable to the last part of Article 326.

However, the words 'illegal practices' have been omitted by Act 58 of 1960 w.e.f. 26.12.1960. Apparently, being relatable to 'crime', to be found in Article 326, Section 16(c) declares that a person may be disqualified for registration in the electoral roll on the basis of other offences in connection with elections. This means that a person would be disqualified for registration in the electoral roll, if he is disqualified under any law relating to corrupt practices or any other offence in connection with elections.

118. In 1951, Parliament enacted The Representation of the People Act, 1951 (hereinafter referred to as, 'the 1951 Act').

119. Thereunder, the word 'election' has been defined in Section 2(d) to mean 'an election to fill a seat or seats in either House of Parliament or in the House or either House of the Legislature of a State. Section 2(e) defines the word 'elector' to mean 'in relation to a constituency means a person whose name is entered in the electoral roll of that constituency for the time being in force and who is not subject to any of the disqualifications mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950)'. Under Part II, Chapter I deals with qualifications for membership of Parliament. Chapter II deals with qualifications for membership of State Legislatures. Chapter III of the 1951 Act provides for disqualifications for membership of Parliament and State Legislatures. Section 8, falling in Chapter III, deals with disqualification upon conviction for certain offences. Various offences are enumerated with the conditions attached therein. Section 8A deals with

disqualification for membership, for both Parliament and State Legislatures, on the ground of corrupt practices. Section 11A, as it stands, reads:

> "11A. Disqualification arising out of conviction and corrupt practices.— (1) If any person, after the commencement of this Act,— is convicted of an offence punishable under section 171E or section 171F of the Indian Penal Code (45 of 1860), or under section 125 or section 135 or clause (a) of sub-section (2) of section 136 of this Act, he shall, for a period of six years from the date of the conviction or from the date on which the order takes effect, be is qualified for voting at any election.
>
> (2) Any person disqualified by a decision of the President under sub-section (1) of section 8A for any period shall be disqualified for the same period for voting at any election.
>
> (3) The decision of the President on a petition submitted by any person under sub-section (2) of section 8A in respect of any disqualification for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State shall, so far as may be, apply in respect of the disqualification for voting at any election incurred by him under clause (b) of sub-section (1) of section 11A of this Act as it stood immediately before the commencement of the Election Laws (Amendment) Act, 1975 (40 of 1975), as if such decision were a decision in respect of the said disqualification for voting also."

120. It is to be noted that Section 11A falls in Chapter IV, which deals with disqualifications for voting. Chapter IXA of the Indian Penal Code, 45 of 1860 deals with offences relating to elections. Undue influence at elections, personation at elections and bribery, are made punishable offences and are offences relating to elections.

121. In the 1951 Act, Chapter IV deals with 'The poll'. Section 62 deals with the Right to Vote. It reads as follows:

> "62. Right to vote.— (1) 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.
>
> (2) No person shall vote at an election in any constituency if he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950 (43 of 1950).
>
> (3) No person shall vote at a general election in more than one constituency of the same class, and if a person votes in more than one such constituency, his votes in all such constituencies shall be void.

> (4) No person shall at any election vote in the same constituency more than once, notwithstanding that his name may have been registered in the electoral roll for the constituency more than once, and if he does so vote, all his votes in that constituency shall be void.
>
> (5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police:
>
> Provided that nothing in this sub-section shall apply to a person subjected to preventive detention under any law for the time being in force.
>
> (6) Nothing contained in sub-sections (3) and (4) shall apply to a person who has been authorised to vote as proxy for an elector under this Act in so far as he votes as a proxy for such elector."

122. Section 62(1) of the 1951 Act means the following:

> A person, who is not entered in the electoral roll of a constituency, shall not be entitled to vote in that constituency. On the other hand, every person, who is, for the time being, entered in the electoral roll of any constituency, is declared entitled to vote in the constituency. Section 62(2) then proceeds to declare that no person shall vote at an election in any constituency, if he is subject to any of the disqualifications referred to in Section 16 of the 1950 Act. In our view, the meaning of the Section 62(1) read with Section 62(2) is the following:
>
> To cast the vote, a person must be included in the electoral roll of the constituency. However, even if it be that he is so included, if at the time of the election, when he casts the vote, he has incurred any of the disqualifications referred to in Section 16 of the 1950 Act, then his Right to Vote will stand eclipsed.

123. Section 62(3) forbids a person, who may find his name in the electoral roll of more than one constituency of the same class, from casting his vote in more than one constituency. In such an eventuality, notwithstanding the fact that his name is so included, if he votes in more than one constituency, his ballot will be void in regard to all the constituencies in which he casts his vote.

124. Equally, under Section 62(4), if his name is included more than once in the electoral roll of the same constituency and should he cast his vote more than once, all the votes in regard to the said constituency are declared void.

125. Section 62(5) enacts a prohibition against the person casting his vote, if he is confined to a prison. This would mean that while a person's name may be included in an electoral roll, which would entitle him, ordinarily, to cast his vote, however, Section 62(5) deprives him of his right to cast his vote, when he is so confined. We have noticed that the validity of this provision has been

upheld in Anukul (supra). Also, we find the same view taken in Chief Election Commissioner and Others v. Jan Chaukidar (Peoples Watch) and Others40, wherein this Court has upheld the validity of Section 62(5). A person may be so confined, if he is under a sentence of imprisonment or transportation or otherwise or if he is in the custody of police. We may, at this juncture, notice one feature. Article 326, undoubtedly, provides for adult suffrage. It declares that if a person is a citizen and is above eighteen years of age and he is not disqualified as provided in Article 326 by or under any law, then, such person shall be entitled to have his name entered in the 40 (2013) 7 SCC 507 electoral roll. It does not expressly say that he shall have the right to cast his vote. The right to cast the vote, as such, is expressly conferred under Section 62(1), undoubtedly, on a person, whose name is entered in the electoral roll. We have already noticed the interplay of Section 62(1) and Section 62(2). Equally, we may notice that even if a person is included in the electoral roll, if he is in confinement in a prison, it would not entitle him or rather it would disentitle him to cast his vote. In other words, while ordinarily, the Right to Vote inevitably follows from the inclusion of a person in the electoral roll, the Right to Vote may be denied in terms of the law as we have noticed. The mere inclusion of a person's name more than once in an electoral roll in a constituency, it has been declared, also would not entitle him to vote more than once [See Section 62(4)]. Equally, inclusion of a person's name in the electoral roll of more than one constituency, would not entitle a person to cast his vote, in terms of such inclusion in more than one constituency [See Section 62(3)]. No doubt, we do notice that this Court has issued notice in a case, which involves a challenge to Section 62(5) of the 1951 Act.

126. Section 16(1)(b) of the 1950 Act, provides for disqualification for a person of unsound mind to be registered in an electoral roll. There is a condition, which is that, he must be so declared by a competent court. Unsoundness of mind is also to be found in Article 326 as a disqualification. Section 16(1)(c) of the 1950 Act, it is to be noticed, disqualifies a person for registration in an electoral roll, if he is for the time being disqualified from voting under any law relating to corrupt practices and other offences in connection with elections. If such a person is included in such electoral roll, his name is to be struck off from the electoral roll [See Section 16(2)]. Section 11A of the 1951 Act provides for disqualifications from voting. We have already noticed its contents.

127. In Desiya Murpokku Dravida Kazhagam (DMDK) and another v. Election Commission of India41, dealing with the validity of the Symbols Order 1968, providing for (2012) 7 SCC 340 recognition and allotment based on the criteria mentioned therein, Justice Chelameswar authored a dissent. In the course of his dissent, the learned Judge, after adverting to Articles 81 and 170, which respectively provided for the composition of the Lok Sabha and the Legislative Assemblies, and, more particularly, that the Members of the said Legislative Bodies, would be chosen by direct elections and after adverting to Articles 325 and 326, held as follows:

> "98. The cumulative effect of all the abovementioned 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."

128. In this regard, we may also notice the Judgment of this Court in Rajbala and others v. State of Haryana and others42. Therein a Bench of two learned Judges was (2016) 2 SCC 445 dealing with the constitutionality of the Haryana Panchayati Raj (Amendment) Act, 2015, under which, certain categories of person were rendered incapable of contesting elections. One such category was persons who did not possess specified educational qualifications. Justice Chelameswar speaking for the Bench, held as follows:

> "31. The right to vote of every citizen at an election either to the Lok Sabha or to the Legislative Assembly is recognised under Articles 325 and 326 subject to limitations (qualifications and disqualifications) prescribed by or under the Constitution. On the other hand, the right to vote at an election either to the Rajya Sabha or to the Legislative Council of a State is confined only to Members of the electoral colleges specified under Articles 80(4) and (5) and Articles 171(3)(a),
>
> (b), (c) and (d) ["171. (3) Of the total number of members of the Legislative Council of a State—(a) as nearly as may be, one-third shall be elected by electorates consisting of members of municipalities, district boards and such other local authorities in the State as Parliament may by law specify;(b) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons residing in the State who have been for at least three years graduates of any university in the territory of India or have been for at least three years in possession of qualifications prescribed by or under any law made by Parliament as equivalent to that of a graduate of any such university;(c) as nearly as may be, one-twelfth shall be elected by electorates consisting of persons who have been for at least three years engaged in teaching in such educational institutions within the State, not lower in standard than that of a secondary school, as may be prescribed by or under any law made by Parliament;(d) as nearly as may be, one-third shall be elected by the members of the Legislative Assembly of the State from amongst persons who are not members of the Assembly;(e) the remainder shall be nominated by the Governor in accordance with the provisions of clause (5)."] respectively. In the case of election to the Rajya Sabha, the electoral college is confined to elected members of Legislative Assemblies of various States and representatives of Union Territories ["80. (4) The representatives of each State in the Council of States shall be elected by the elected members of the Legislative Assembly of the State in accordance with the system of proportional representation by means of the single transferable vote."].

In the case of the Legislative Council, the electoral college is divided into four parts consisting of: (i) members of various local bodies specified under Article 171(3)(a); (ii) certain qualified graduates specified under Article 171(3)(b); (iii) persons engaged in the occupation of teaching in certain qualified institutions described under Article 171(3)(c); and (iv) Members of the Legislative Assembly of the State concerned.

Interestingly, persons to be elected by the electors falling under any of the abovementioned categories need not belong to that category, in other words, need not be a voter in that category. [G. Narayanaswami v. G. Pannerselvam, (1972) 3 SCC 717, pp. 724-25, para 14:"14. Whatever may have been the opinions of Constitution-makers or of their advisers, whose views are cited in the judgment under appeal, it is not possible to say, on a perusal of Article 171 of the Constitution, that the Second Chambers set up in nine States in India were meant to incorporate the principle of what is known as 'functional' or 'vocational' representation which has been advocated by Guild-Socialist and Syndicalist Schools of Political Thought. Some of the observations quoted above, in the judgment under appeal itself, militate with the conclusions reached there. All that we can infer from our constitutional provisions is that additional representation or weightage was given to persons possessing special types of knowledge and experience by enabling them to elect their special representatives also for Legislative Councils. The concept of such representation does not carry with it, as a necessary consequence, the further notion that the representative must also possess the very qualifications of those he represents."]"

129. Thereafter the Court also held as follows:

> "38. We, therefore, proceed on the basis that, subject to restrictions mentioned above, every citizen has a constitutional right to elect and to be elected to either Parliament or the State Legislatures."

130. Still further, the Court held as follows:

> "The right to vote at an election to the Lok Sabha or the Legislative Assembly can only be subjected to restrictions specified in Article
>
> 326. It must be remembered that under Article 326, the authority to restrict the right to vote, can be exercised by the appropriate Legislature."

131. What are the incidents of a legal right? In Salmond on Jurisprudence, we find the following discussion about the characteristics of a legal right:

> "(1) It is vested in a person who may be distinguished as the owner of the right, the subject of it, the person entitled, the person of inherence.
>
> (2) It avails against a person, upon whom lies the correlative duty. He may be distinguished as the person bound, or as the subject of the duty, or as the person of incidence.
>
> (3) It obliges the person bound to an act or omission in favour of the person entitled. This may be termed the content of the right.
>
> (4) The act or omission relates to some thing (in the widest sense of that word), which may be termed the object or subject-matter of the right.

(5) Every legal right has a title, that is to say, certain facts or events by reason of which the right has become vested in its owner."

132. Article 168 of the Constitution reads as follows:

"168. Constitution of Legislatures in States (1) For every State there shall be a Legislature which shall consist of the Governor, and

(a) in the States of Bihar, Madhya Pradesh, Maharashtra, Karnataka and Uttar Pradesh, two houses:

(b) in other States, one House (2) Where there are two Houses of the Legislature of a State, one shall be known as the Legislative Council and the other as the Legislative Assembly, and where there is only one House, it shall be known as the Legislative Assembly."

133. A perusal of Article 168(2) would lead us to the following inevitable conclusion:

Wherever there are two Houses in a Legislature of a State, one is designated as Legislative Assembly and the other is called a Legislative Council. In States, where there is only one House, it will be called the Legislative Assembly. So, it is that Article 170 deals with the composition of Legislative Assemblies whereas Article 171 deals with the composition of Legislative Councils. We may bear in mind that Section 27 of the 1950 Act [referred to in Shyamdeo Pd. Singh (supra)] actually deals with the preparation of electoral roll for the Legislative Council and not the Legislative Assembly. We make this observation only to remind ourselves that there is a distinction between the Legislature of a State and Legislative Assembly.

Article 168 deals with the constitution of the Legislatures of the States. Apart from the Governor, a Legislative Assembly, when there is only one House, would be the other constituent part of the Legislature of the State. Therefore, Article 326 deals with the House of the People, and the Legislative Assembly. It does not deal with Legislative Councils. As far as Article 327 is concerned, it deals with power of Parliament to make law with respect to all matters or relating to election in connection to either House of Parliament. Equally, Parliament can make law in regard to either House of the Legislature of a State, including the preparation of electoral roll. However, there is a caveat. Article 327 begins with the words 'subject to the provisions of this Constitution'. This would mean that Article 327 is subject to Article 326.

Therefore, since Article 326 provides for the specific heads of disqualification in regard to election to the House of the People and to the Legislative Assembly, the power to make law under Article 327 may not be available, overcoming the limitation as regards the grounds of disqualification enumerated in Article 326.

> This limitation is found even in Article 328, which deals with the powers of the State Legislature.

134. Undoubtedly, the Founding Fathers contemplated conferring the right to participate in elections to the House of People and the Legislative Assemblies on all citizens, who were of a certain age. The right was, however, subject to the condition that they were not to be disqualified. The disqualifications, again, were, however, limited to what was contained in Article 326. The disqualifications, no doubt, were to be expressly provided by a law to be made by the appropriate Legislature. The disqualification or rather qualification included the aspect of residence. Section 20 of the 1950 Act elaborates upon the concept of residence. Likewise, in the matter of corrupt practices and other crimes in connection with elections, within the meaning of Section 16(c) of the 1950 Act, the matter is to be regulated by the law.

135. Having noticed all the relevant provisions and bearing in mind the characteristics of a legal right, we find as follows:

> Since every legal right, which would include a Constitutional Right, [as the Constitution is also law though the grundnorm and not law for the purpose of Article 13,] must have a title, we must ascertain whether a citizen of India, who is not less than eighteen years, as, on the 'qualifying date', as found by us, has a right. Since, the title to a legal right means, "the facts or events, by reason of which, the rights become vested in its owner", who is the person of inherence, we will explore, whether Article 326 contains the facts and reasons and whether it also contains the content of a Right. In keeping with the mandate of Article 326, Parliament has made the 1950 Act and the 1951 Act. It is thereafter that the first general elections were held in the country. It may be true that the 1950 Act and the 1951 Act have been amended from time to time. At any given point of time, placing Article 326 side-by-side with the law made by Parliament or the law made by the State Legislature, we would find that, if a person is a citizen of India and not below eighteen years of age, and if he does not incur the disqualifications, which cannot be more than what is provided in Article 326, but the content of which, may be provided by the law made by the competent Legislature and the citizen not less than eighteen years does not have the disqualifications, he becomes entitled to be entered in the electoral roll. Such person, as is indicated in Article 326, indeed, has a right, which can be said to be a Constitutional Right, which may be right subject to the restriction. Section 62(1) of the 1951 Act, as we have noticed, gives also the Right to Vote to such a person. Any other interpretation would whittle down the grand object of conferring adult suffrage on citizens.

136. The mere fact that for the creation of a Right, one needs to lean on certain facts, which may consist of a law, which, in turn, is in the main respects dictated to by the constitutional provision, may not detract from the existence of a Right. Article 19 confers fundamental freedoms, which are understood as Fundamental Rights. The Fundamental Rights can be regulated by law made under Article 19(2) to Article 19(6). Could it be said that, in view of the power to regulate the Fundamental

Right, no right exists? We are conscious that in the case of Fundamental Rights under Article 19, it could be said that the Right exists and it is only made subject to a law, which may be made. However, could it be said that whenever a law is made by Parliament, acting even within the boundaries of Article 326, by amending or adding to the disqualifications, even if it be limited by the disqualifications declared in Article 326, that such a law could be described as falling foul of the Constitution, as contained in Article 326?

137. Take for instance, a new corrupt practice is added by law. Would it be vulnerable on the ground that it takes away the Constitutional right under Article 326? We would think that it may not. What would be the position if the Legislature had not provided for any corrupt practice or a crime as a disqualification. Then there would be no such disqualification. However, the appropriate Legislature is also limited in the matter of the disqualifications by Article 326. In that sense, it could be said that Article 326 provides a constitutional right, subject to restrictions which the law provides for, which must finally be traced to its shores. Section 62(1) of the 1950 Act provides the fulfilment of the goal of adult suffrage guaranteed in Article 326. Article 326(3) and Article 326(4) are only meant to provide against the misuse of the right. Section 62(2) is clearly reconcilable with Article 326. Section 62(5) again appears to be a restriction.

138. In regard to Article 326, we may observe, when the Founding Fathers clearly created a right on the citizen, who was an adult, (the age was originally 21 years and it was lowered to 18 years), to have his name entered in the electoral roll unless he has incurred disqualifications, which, in turn, were limited to those mentioned in Article 326, they were to be provided by law. It is clear that a law necessarily had to be made. The law was, indeed, made as we have noted by the 1950 and 1951 Acts, providing for the true contours of the disqualification limited to what was provided in Article 326. Imagine a situation, if Parliament had not passed 1950 and 1951 Acts, it would have led to a situation where the foundational democratic process of holding elections to the House of the People and the Legislative Assemblies would have been rendered impossible. A law had to be made and it was made. Not making the law would have led to a constitutional breakdown. We make these remarks to remind ourselves that treating the Constitution as the grundnorm, providing the very edifice of the State and the Legal System, the making of the law by the Legislative Body, which is a power entrusted to the Legislative Branch, may come with a duty. A conferment of legislative power, as is done under Article 245 read with Article 246 of the Constitution, is not to be confused with the making of the law under Article 326. The conferment of a legislative power under Article 245 read with Article 246 is the essential legislative powers in terms of the separation of power envisaged broadly under the Constitution.

139. We have noticed that we cannot and we need not finally pronounce on this aspect, in view of the fact that a Constitution Bench of this Court, which we have noticed in Kuldip Nayar (supra) has proceeded to hold that there is no Constitutional Right.

140. What is important is that the Court noted in Anukul (supra) that holding of free and fair elections constitute a basic feature of the Constitution and approved of the view apparently that the Right to Elect is fundamental to democracy [See Jyoti Basu (supra)].

141. Even if it is treated as a statutory right, which, at any rate, cannot be divorced or separated from the mandate of Article 326, the right is of the greatest importance and forms the foundation for a free and fair election, which, in turn, constitutes the right of the people to elect their representatives. We would for the purpose of the lis in question rest content to proceed on the said basis.

T. DEMOCRACY AND THE IMPORTANCE OF ELECTIONS

142. Dr. B.R. Ambedkar made the following pertinent observations regarding democracy in the course of his speech in the Constituent Assembly on 25.11.1949:

> "What we must do is not to be content with mere political democracy. We must make our political democracy a social democracy as well. Political democracy cannot last unless there lies at the base of it a social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles — liberty, equality and fraternity — are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality, which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty.
>
> On January 26, 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man, one vote and one vote, one value. In our social and economic life we shall, by reason of our social and economic structure, continue to deny the principle of one man, one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which we have so laboriously built up."

143. In Indira Nehru Gandhi Smt. v. Raj Narain and another 143, this Court adverted to the importance of elections in a democracy as follows:

> "198. ... Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they so

choose, to 1975 Supp SCC 1 change the representatives and elect in their place other representatives. 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 defence 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. Even in the absence of unfair means and malpractices, some times the result of an election is materially affected because of the improper rejection of ballot papers. ..."

144. Aharon Barak, President of Supreme Court of Israel in his book 'The Judge in a Democracy' articulates concepts about democracy succinctly. He says the following while answering the difficult question as to what is democracy:

"What is democracy? According to my approach, democracy is a rich and complex normative concept. It rests on two bases. The first is the sovereignty of the people. This sovereignty is exercised in free elections, held on a regular basis, in which the people choose their representatives, who in turn represent their views. This aspect of democracy is manifested in majority rule and in the centrality of the legislative body through which the people's representatives act.

This is a formal aspect of democracy. It is of central importance, since without if the regime is not democratic.

The second aspect of democracy is reflected in the rule of values (other than the value of majority rule) that characterize democracy. The most important of these values are separation of powers, the rule of law, judicial independence, human rights, and basic principles that reflect yet other values (such as morality and justice), social objectives (such as the public peace and security), and appropriate ways of behavior (reasonableness, good faith). This aspect of democracy is the rule of democratic values. This is a substantive aspect of democracy. It too is of central importance. Without it, a regime is not democratic.

Both aspects, the formal and the substantive, are necessary for democracy. They are "nuclear characteristics." I discussed them in one case, holding that "these characteristics are based ... upon the recognition of the sovereignty of the people manifested in free and egalitarian elections; recognition of the nucleus of human rights, among them dignity and equality, the existence of separation of powers, the rule of law, and an independent judiciary." (Emphasis Supplied)

145. He dilates on the qualities that inform a substantive democracy as follows: -

> "Democracy is not satisfied merely by abiding by proper elections and legislative supremacy. Democracy has its own internal morality based on the dignity and equality of all human beings. Thus, in addition to formal requirements (elections and the rule of the majority), there are also substantive requirements. These are reflected in the supremacy of such underlying democratic values and principles as separation of powers, the rule of law, and independence of the judiciary. They are based on such fundamental values as tolerance, good faith, justice, reasonableness, and public order. Above all, democracy cannot exist without the protection of individual human rights – rights so essential that they must be insulated from the power of the majority.
>
> Democracy is not just the law of rules and legislative supremacy; it is a multidimensional concept. It requires recognition of both the power of the majority and the limitations on that power." (Emphasis Supplied)

146. On the topic of Change and Stability and elaborating on 'The Dilemma of Change', the learned Judge writes: -

> "The Dilemma of Change The need for change presents the judge with a difficult dilemma, because change sometimes harms security, certainty, and stability. The judge must balance the need for change with the need for stability. Professor Roscoe Pound expressed this well more than eighty years ago:
>
> "Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. Law must be stable and yet it cannot stand still." Stability without change is degeneration.
>
> Change without stability is anarchy. The role of a judge is to help bridge the gap between the needs of society and the law without allowing the legal system to degenerate or collapse into anarchy. The judge must ensure stability with change, and change with stability. Like the eagle in the sky, which maintains its stability only when it is moving, so too is the law stable only when it is moving. Achieving this goal is very difficult. The life of the law is complex. It is not mere logic. It is not mere experience. It is both logic and experience together. The progress of case law throughout history must be cautious. The decision is not between stability or change. It is a question of the speed of the change. The decision is not between rigidity or flexibility. It is question of the degree of flexibility." (Emphasis Supplied)

147. In S.R. Chaudhuri v. State of Punjab and Others,44, this Court had to deal with the question whether the person who was not a Member of the Assembly and who failed to get himself elected during the period of six consecutive months, after appointment as Minister, could be reappointed as Minister without being elected after the expiry of the period of six consecutive months. The decision involved the interpretation of 44 (2001) 7 SCC 126 Article 164, and in particular, Article 164 (4) of the Constitution of India. Article 164 reads as follows.

"164. Other provisions as to Ministers. — (1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the Ministers shall hold office during the pleasure of the Governor:

> Provided that in the States of Bihar, Madhya Pradesh and Orissa, there shall be a Minister in charge of tribal welfare who may in addition be in charge of the welfare of the Scheduled Castes and Backward Classes or any other work.
>
> (2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.
>
> (3) Before a Minister enters upon his office, the Governor shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.
>
> (4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.
>
> (5) The salaries and allowances of Ministers shall be such as the Legislature of the State may from time to time by law determine and, until the Legislature of the State so determines, shall be as specified in the Second Schedule." A Bench of three Learned Judges of this Court disapproving of the resort to repeated appointments without the Minister getting elected held as follows:
>
> "21. Parliamentary democracy generally envisages (i) representation of the people,
>
> (ii) responsible government, and
>
> (iii) accountability of the Council of Ministers to the Legislature. The essence of this is to draw a direct line of authority from the people through the Legislature to the executive. The character and content of parliamentary democracy in the ultimate analysis depends upon the quality of persons who man the Legislature as representatives of the people. It is said that "elections are the barometer of democracy and the contestants the lifeline of the parliamentary system and its set-up"." "33. Constitutional provisions are required to be understood and interpreted with an object-

oriented approach. A Constitution must not be construed in a narrow and pedantic sense. The words used may be general in terms but, their full import and true meaning, has to be appreciated considering the true context in which the same are used and the purpose which they seek to achieve. Debates in the Constituent Assembly referred to in an earlier part of this judgment clearly indicate that a non-member's inclusion in the Cabinet was considered to be a "privilege" that extends only for six months, during which period the member must get elected, otherwise he would cease to be a Minister. It is a settled position that debates in the Constituent Assembly may be relied upon as an

aid to interpret a constitutional provision because it is the function of the court to find out the intention of the framers of the Constitution. We must remember that a Constitution is not just a document in solemn form, but a living framework for the Government of the people exhibiting a sufficient degree of cohesion and its successful working depends upon the democratic spirit underlying it being respected in letter and in spirit. The debates clearly indicate the "privilege" to extend "only" for six months."" (Emphasis supplied)

148. In B.R. Kapur v. State of T.N. and Another,45 interpreting Article 164 again a Constitution Bench which also relied upon Constituent Assembly Debates held that a non-legislator could become a Chief Minister or Minister under Article 164 only if he had the qualification for membership of the legislative body and was also not disqualified within the meaning of Article 191. Of relevance to the cases before us are the following observations of Justice G.B. Pattanaik which are as follows: -

> "In a democracy, constitutional law reflects the value that people attach to orderly human relations, to individual freedom under the law and to institutions such as Parliament, political parties, free elections and a free press.
>
> xxxx xxxx xxxx
>
> 45 (2001) 7 SCC 231
>
> The said Constitution occupies the primary place. Notwithstanding the fact, we have a written constitution, in course of time, a wide variety of rules and practices have evolved which adjust operation of the Constitution to changing conditions.
>
> xxxx xxxx xxxx
>
> Many important rules of constitutional
>
> behaviour, which are observed by the Prime Minister and Ministers, members of the Legislature, Judges and civil servants are contained neither in Acts nor in judicial decisions. But such rules have been nomenclatured by the constitution-writers to be the rule of "the positive morality of the constitution" and sometimes the authors provide the name to be "the unwritten maxims of the constitution" — rules of constitutional behaviour, which are considered to be binding by and upon those who operate the Constitution but which are not enforced by the law courts nor by the presiding officers in the House of Parliament." (Emphasis supplied)

149. In B.P. Singhal v. Union of India and Another46, dealing with Article 156(1) which declares that a Governor shall hold office during the pleasure of the President. This Court held after declaring that the Governor is not an agent of the ruling party at the Centre, as follows: -

46 (2010) 6 SCC 331 "71. When a Governor holds office during the pleasure of the Government and the power to remove at the pleasure of the President is not circumscribed by any conditions or restrictions, it follows that the power is exercisable at any time, without assigning any cause. However, there is a distinction between the need for a cause for the removal, and the need to disclose the cause for removal. While the President need not disclose or inform the cause for his removal to the Governor, it is imperative that a cause must exist." As regards the Limitations/ Restrictions on the exercise of removal of Governor, this Court observed as follows: -

"(iv) Limitations/Restrictions upon the power under Article 156(1) of the Constitution of India

48. We may now examine whether there are any express or implied limitations or restrictions on the power of removal of Governors under Article 156(1). We do so keeping in mind the following words of Holmes, J.:

"... the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions... The significance is vital, nor formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth" (see Gompers v. United States [58 L Ed 1115 : 233 US 604 (1913)] , L Ed p. 1120)." (Emphasis supplied) U. POWERS, FUNCTIONS AND JURISDICTION OF THE ELECTION COMMISSION OF INDIA

150. Article 324 is a plenary provision clothing the Election Commission with the entire responsibility to hold the National and State elections and carries with it the necessary powers to discharge its functions. However, the Commission cannot act against a law framed by Parliament or the State Legislature. The power of the Commission is also subject to norms of fairness and it cannot act arbitrarily. The action cannot be mala fide. Article 324 governs in matters not covered by legislation. Being a high functionary who is expected to function fairly and legally if he does otherwise, the courts can veto the illegal action (See Mohinder Singh Gill and Another v. Chief Election Commissioner, New Delhi and Others,47).

151. The Election Commission under Article 324 can postpone an election on the basis of the opinion that there existed disturbed conditions in the State or some area of the State thus making of holding free and fair elections not possible. The court followed the views 47 (1978) 1 SCC 405) in the Mohinder Singh Gill case (supra) that democracy depends on the man as much as on the Constitution [See Digvijay Mote v. Union of India and Others48]. The Election Commission is endowed with the power to recognise political parties and to decide disputes arising among them. It can also adjudicate controversies between splinter groups within a political party. The Commission has been found to have the power to issue the symbols order. This right has been traced to Article 324 [(See All Party Hill Leaders Conference Shillong v. Captain W.A. Sangma and Others49, and Kanhiya Lal Omar v. R.K. Trivedi and Others50)].

152. Recognising the magnitude of the exercise involved in ensuring free and fair elections, this Court declared that in case of conflict of opinion between the Election Commission and the Government, as to the adequacy of the machinery to deal with the state of law and order, the assessment of the Election Commission was to prima facie prevail. This Court, no doubt, also 48 (1993) 4 SCC 175 49 (1977) 4 SCC 161 50 (1985) 4 SCC 628 observed that a mutually acceptable coordinating machinery may be put in place (see Election Commission of India v. State of T.N and Others51).

153. While dealing with the power of the Election Commission to requisition such staff "for election duty" and disagreeing with the Commission that it could requisition the service of the employees of the State Bank of India, this Court declared that the election commission did not have untrammelled power. The power must be traced to the Constitution or a law (see Election Commission of India v. State Bank of India Staff Association Local Head Office Unit, Patna and Others52).

154. The Election Commission has power to issue directions for the conduct of elections requiring the political parties to submit the details of the expenditure incurred or authorised by them for the purpose of the election of their respective candidates. This power was traced to the words "conduct of 51 (1995) Suppl. 3 SCC 379 52 (1995) suppl.2 SCC 13 elections" [See Common Cause (A Registered Society) v. Union of India and Others53].

155. All powers though not specifically provided but necessary for effectively holding the elections are available to the Election Commission. [See Election Commission of India v. Ashok Kumar and Others54].

156. Article 324 is a reservoir of power to be used for holding free and fair elections. The Commission as a creature of the Constitution may exercise it in an infinite variety of situations. In a democracy, the electoral process plays a strategic role. The commission can fill up the vacuum by issuing directions until there is a law made. This was laid down in the context of directions aimed at securing information about the candidates [See Union of India v. Association for Democratic Reforms and Others55].

157. Following a spate of violence in the State of Gujarat and upon the dissolution of the Assembly, the Commission took the view that it may not be possible 53 (1996) 2 SCC 752 54 (2000) 8 SCC 216 55 (2002) 5 SCC 294 to hold the election though Article 174(1) mandated that there shall not be more than six months in between the last session of the assembly and the first meeting of the next session. After finding that Article 174 did not apply to a dissolved assembly as was indeed the case, this Court reiterated that the words 'superintendence, control, direction as also 'the conduct of all elections' were the broadest terms. This court also found that if there is no free and fair periodic election, it is the end of democracy. [See (2000) 8 SCC 237]. The said judgment was rendered while answering a reference made to this Court under Article 143 of the Constitution.

158. The Election Commission has the power to lay down a certain benchmark to be achieved by a party in State politics before it could be recognised as a political party [See Desiya Murpokku Dravida Kazhagam (DMDK) v. Election Commission of India and Others56]. Justice J.

Chelameswar wrote a dissenting opinion. 56 (2012) 7 SCC 340

159. While dealing with the aspect of jurisdiction of the Election Commission under Section 10A of the 1951 Act to ascertain whether there has been a failure to lodge true, correct and genuine accounts of bona fide election expenditure and that it did not exceed the maximum limit, the Election Commission has been found to have overarching powers and it has been described as a 'guardian of democracy'. In this regard, we notice the following words of this Court in Ashok Shankarrao Chavan v. Madhavrao Kinhalkar57 :

> "67. In this context, we also keep in mind the Preamble to the Constitution which in liberal words states that the People of India having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all citizens justice, liberty, equality and fraternity. In such a large democratic country such as ours, if purity in elections is not maintained, and for that purpose when the Constitution makers in their wisdom thought it fit to create an authority, namely, the Election Commission and invested with it the power of superintendence, control and also to issue directions, it must be stated that such power invested with the said constitutional authority should not be a mere empty formality but an effective and stable one, in whom the citizens of this country can repose in and look upon to ensure that such unscrupulous elements and their attempts to enter into political (2014) 7 SCC 99 administration of this vast country are scuttled. In that respect, since the ruling of this vast country is always in the hands of the elected representatives of the people, the enormous powers of the Election Commission as the guardian of democracy should be recognised.

It is unfortunate that those who are really interested in the welfare of society and who are incapable of indulging in any such corrupt practices are virtually side-lined and are treated as totally ineligible for contesting the elections." (Emphasis supplied)

160. Under Article 103(2) and Article 192(2), the President and the Governor are to act on the opinion of the Election Commission as regards the question of disqualification of the Member of Parliament and of the Legislature of a State, respectively. This is the advisory jurisdiction of the Election Commission. It exercises vast administrative powers. Further, the Election Commission discharges quasi-judicial functions also.

V. THE IMPACT OF ARTICLE 329(b)

161. Article 329 (b) declares as follows:

> "(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

162. Regarding the impact of Article 329(b), a Bench of three learned judges after an exhaustive review of the earlier case law has set down the following summary of conclusions in the case of Election Commission of India v. Ashok Kumar58:

> "31. The founding fathers of the Constitution have consciously employed use of the words "no election shall be called in question" in the body of Section 329(b) and these words provide the determinative test for attracting applicability of Article 329(b). If the petition presented to the Court "calls in question an election" the bar of Article 329(b) is attracted. Else it is not.
>
> 32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:
>
> (1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may (2000) 8 SCC 216 have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.
>
> (2) Any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.
>
> (3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.
>
> (4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court.
>
> (5) The court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a

> petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the court would act with reluctance and shall not act, except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material.

33. These conclusions, however, should not be construed as a summary of our judgment. These have to be read along with the earlier part of our judgment wherein the conclusions have been elaborately stated with reasons."

163. We would, therefore, find that the Election Commission of India has been charged with the duty and blessed with extraordinary powers to hold elections to both Parliament and state legislatures from time to time. This is an enormous task. The power it possesses under Article 324 is plenary. It is only subject to any law which may be made by Parliament or by the State Legislature. Undoubtedly, the Election Commission is duty bound to act in a fair and legal manner. It must observe the provisions of the Constitution and abide by the directions of the Court. The same being done, it can draw upon a nearly infinite reservoir of power. Once the poll is notified, [which again is a call to be taken by the Election Commission itself, and indeed capable of being misused and the subject of considerable controversy, if bias or subservience to the powers that be, is betrayed], it assumes unusual powers. Its writ lies across Governments over the length and breadth of the country. Officers of the Government who come under its charge become subject to the superintendence of the Commission. The fate of the political parties and its candidates, and therefore, of democracy itself to a great measure is allowed to rest in the hands of the Election Commission. While there may be officers who assist the Commission, vitally important decisions have to be taken by those at the helm of the affairs. It is the Chief Election Commissioner and the Election Commissioners at whose table the buck must stop. It is in this scenario, we bear in mind that when a decision is taken in the process of the holding of the poll, that subject to proceedings which are initiated in courts which conduce to the effective holding of the poll, any proceeding which seeks to bring the election process under a shadow is tabooed. The significance of this aspect is that it adds to the enormity of the powers and responsibilities of the Election Commission. Awaiting the outcome of the poll to question the election before the tribunal may result in many illegal, unfair and mala fide decisions by the Election Commission passing muster for the day. Once the election results are out, the matter is largely reduced to a fait accompli. In fact, many a time an omission or a delay in taking a decision can itself be fatal to the holding of a free and fair poll. The relief vouchsafed in an election petition may not by itself provide a just solution to the conduct of election in an illegal, mala fide or unfair manner. These observations have a direct connection with the question with which we are concerned with, namely, the need to take the appointment of the members of the Election commission out of the exclusive hands of the executive, namely, the party which not unnaturally has an interest in perpetuating itself in power.

W. PURSUIT OF POWER; A MEANS TO AN END OR AN END IN ITSELF?

164. The basic and underlying principle central to democracy is power to the people through the ballot. Abrahim Lincoln declared democracy to be Government of the people, by the people and for

the people. A political party or a group or a coalition assumes reigns of governance. The purpose of achieving power is to run the Government. No doubt, the Government must be run in accordance with the dictate of the Constitution and the laws. Political parties not unnaturally come out with manifestos containing a charter of promises they intend to keep. Without attaining power, men organised as political parties cannot achieve their goals. Power becomes, therefore, a means to an end. The goal can only be to govern so that the lofty aims enshrined in the directive principles are achieved while observing the fundamental rights as also the mandate of all the laws. What is contemplated is a lawful Government. So far so good. What, however, is disturbing and forms as we understand the substratum of the complaints of the petitioner is the pollution of the stream or the sullying of the electoral process which precedes the gaining of power. Can ends justify the means? There can be no doubt that the strength of a democracy and its credibility, and therefore, its enduring nature must depend upon the means employed to gain power being as fair as the conduct of the Government after the assumption of power by it. The assumption of power itself through the electoral process in the democracy cannot and should not be perceived as an end. The end at any rate cannot justify the means. The means to gain power in a democracy must remain wholly pure and abide by the Constitution and the laws. An unrelenting abuse of the electoral process over a period of time is the surest way to the grave of the democracy. Democracy can succeed only in so far as all stakeholders uncompromisingly work at it and the most important aspect of democracy is the very process, the electoral process, the purity of which alone will truly reflect the will of the people so that the fruits of democracy are truly reaped. The essential hallmark of a genuine democracy is the transformation of the 'Ruled' into a citizenry clothed with rights which in the case of the Indian Constitution also consist of Fundamental Rights, which are also being freely exercised and the concomitant and radical change of the ruler from an 'Emperor' to a public servant. With the accumulation of wealth and emergence of near monopolies or duopolies and the rise of certain sections in the Media, the propensity for the electoral process to be afflicted with the vice of wholly unfair means being overlooked by those who are the guardians of the rights of the citizenry as declared by this Court would spell disastrous consequences.

X. RULE OF LAW; FUNDAMENTAL RIGHTS AND AN INDEPENDENT ELECTION COMMISSION

165. The cardinal importance of a fiercely independent, honest, competent and fair Election Commission must be tested on the anvil of the rule of law as also the grand mandate of equality. We expatiate. Rule of law is the very bedrock of a democratic form of governance. It simply means that men and their affairs are governed by pre-announced norms. It averts a democratic Government brought to power by the strength of the ballot betraying their trust and lapsing into a Government of caprice, nepotism and finally despotism. It is the promise of avoidance of these vices which persuades men to embrace the democratic form of Government. An Election Commission which does not ensure free and fair poll as per the rules of the game, guarantees the breakdown of the foundation of the rule of law. Equally, the sterling qualities which we have described which must be possessed by an Election Commission is indispensable for an unquestionable adherence to the guarantee of equality in Article 14. In the wide spectrum of powers, if the Election Commission exercises them unfairly or illegally as much as he refuses to exercise power when such exercise becomes a duty it has a telling and chilling effect on the fortunes of the political parties. Inequality

in the matter of treatment of political parties who are otherwise similarly circumstanced unquestionably breaches the mandate of Article 14. Political parties must be viewed as organisations representing the hopes and aspirations of its constituents, who are citizens. The electorate are ordinarily, supporters or adherents of one or the other political parties. We may note that the recognition of NOTA, by this Court enabling a voter to express his distrust for all the candidates exposes the disenchantment with the electoral process which hardly augurs well for a democracy. Therefore, any action or omission by the Election Commission in holding the poll which treats political parties with an uneven hand, and what is more, in an unfair or arbitrary manner would be anathema to the mandate of Article 14, and therefore, cause its breach. There is an aspect of a citizen's right to vote being imbued with the fundamental freedom under Article 19(1)(a). The right of the citizen to seek and receive information about the candidates who should be chosen by him as his representative has been recognised as a fundamental right [See Public Interest Foundation (supra)]. The Election Commissioners including the Chief Election Commissioner blessed with nearly infinite powers and who are to abide by the fundamental rights must be chosen not by the Executive exclusively and particularly without any objective yardstick. Y. THE SYMBOLS ORDER; THE MODEL CODE OF CONDUCT

166. Apart from the 1950 and 1951 Acts, the Code of Election Rules, 1961 came to be made. In the year 1968, The Election Symbols (Reservation and Allotment) Order, 1968 [hereinafter referred to as, 'the Symbols Order'] came to be made by Notification dated 31.08.1968, in exercise of powers conferred under Article 324 of the Constitution read with Section 29A of the 1951 Act and Rules 5 and 10 of the Conduct of Elections Rules. The Symbols Order deals with allotment and classification of symbols. Political parties are broadly divided into recognised political parties or unrecognised political parties. A recognised party may be a national party or a state party. Conditions for recognition of a party as national party and state party are separately laid down. Paragraph-15 of the Symbols Order reads as follows:

> "15. Power of Commission in relation to splinter groups or rival sections of a recognised political party– When the Commission is satisfied on information in its possession that there are rival sections or groups of a recognised political party each of whom claims to be that party, the Commission may, after taking into account all the available facts and circumstances of the case and hearing such representatives of the sections or groups and other persons as desire to be heard, decide that one such rival section or group or none of such rival sections or groups is that recognised political party and the decision of the Commission shall be binding on all such rival sections or groups."

167. Paragraph-16 deals with power of the Commission in case of amalgamation of two political parties.

168. In the very same year, that is 1968, a Model Code of Conduct also came to be issued. As of date, a large body of norms, forming part of the Model Code of Conduct, have been put in place. The Model Code of Conduct for Guidance of Political Parties and Candidates provides, inter alia, as follows:

> "1. No party or candidate shall include in any activity which may aggravate existing differences or create mutual hatred or cause tension between different castes and communities, religious or linguistic.
>
> xxx xxx xxx
>
> 3. There shall be no appeal to caste or communal feelings for securing votes. Mosques, Churches, Temples or other places of worship shall not be used as forum for election propaganda.
>
> 4. All parties and candidates shall avoid scrupulously all activities which are "corrupt practices" and offences under the election law, such as bribing of voters, intimidation of voters, impersonation of voters, canvassing within 100 meters of polling stations, holding public meetings during the period of 48 hours ending with the hour fixed for the close of the poll, and the transport and conveyance of voters to and from polling station."

169. Thereafter, it proceeds to deal with meetings, processions, polling day conduct. In regard to the party in power, we find the following as part of the Model Code of Conduct. Part VII of the Model Code of Conduct, inter alia, reads as follows:

> "VII. Party in Power The party in power whether at the Centre or in the State or States concerned, shall ensure that no cause is given for any complaint that it has used its official position for the purposes of its election campaign and in particular – XXXX XXXX XXXX
>
> 1. (b) Government transport including official air-crafts, vehicles, machinery and personnel shall not be used for furtherance of the interest of the party in power;
>
> XXXX XXXX XXXX
>
> 3. Rest houses, dak bungalows or other Government accommodation shall not be monopolized by the party in power or its candidates and such accommodation shall be allowed to be used by other parties and candidates in a fair manner but no party or candidate shall use or be allowed to use such accommodation (including premises appertaining thereto) as a campaign office or for holding any public meeting for the purposes of election propaganda;
>
> 4. Issue of advertisement at the cost of public exchequer in the newspapers and other media and the misuse of official mass media during the election period for partisan coverage of political news and publicity regarding achievements with a view to furthering the prospects of the party in power shall be scrupulously avoided.

> 5. Ministers and other authorities shall not sanction grants/payments out of discretionary funds from the time elections are announced by the Commission; and" There are other aspects relating to Election Manifestos. There is a clear need for a fearless and independent Election Commission of India to give full effect to these salutary principles.

170. Paragraph-16A of the Symbols Order inserted by Notification dated 18.02.1994, reads as follows:

> "16A. Power of Commission to suspend or withdraw recognition of a recognised political party for its failure to observe Model Code of Conduct or follow lawful directions and instructions of the Commission-
>
> Notwithstanding anything in this Order, if the Commission is satisfied on information in its possession that a political party, recognised either as a National party or as a State party under the provisions of this Order, has failed or has refused or is refusing or has shown or is showing defiance by its conduct or otherwise
>
> (a) to observe the provisions of the 'Model Code of Conduct for Guidance of Political Parties and Candidates' as issued by the Commission in January, 1991 or as amended by it from time to time, or (b) to follow or carry out the lawful directions and instructions of the Commission given from time to time with a view to furthering the conduct of free, fair and peaceful elections or safeguarding the interests of the general public and the electorate in particular, the Commission may, after taking into account all the available facts and circumstances of the case and after giving the party reasonable opportunity of showing cause in relation to the action proposed to be taken against it, either suspend, subject to such terms as the Commission may deem appropriate, or withdraw the recognition of such party as the National Party or, as the case may be, the State Party." (Emphasis supplied)

171. In Abhiram Singh v. C.D. Commachen (DEAD) by Legal Representatives and others59, a Bench of seven learned Judges of this Court had to interpret the word 'his' in Section 123 of the Representation of the People Act.

(2017) 2 SCC 629 By a 4:3 majority, this Court held that the word 'his' in Section 123(3) of the Representation of the People Act, 1951, for the purpose of maintaining the purity of the electoral process, must be given a broad and purposive interpretation so that any appeal made to an elector by a candidate or his agent or by any other person with the consent of the candidate or his election agent, to vote or refrain from voting, inter alia, on the grounds of religion and caste, would constitute a corrupt practice. Dr. T.S. Thakur, C.J., wrote a concurring Judgment and we find it apposite to notice the following passage from his Judgment on the importance of India being a secular country and about according any particular religion, special privileges, being a violation of the basic principles of democracy:

> "35. At the outset, we may mention that while considering the mischief sought to be suppressed by clauses (2), (3) and (3-A) of Section 123 of the Act, this Court observed in Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra [Ziyauddin Burhanuddin Bukhari v. Brijmohan Ramdass Mehra, (1976) 2 SCC 17, decided by a Bench of three learned Judges.] that the historical, political and constitutional background of our democratic set-up needed adverting to. In this context, it was said that our Constitution-makers intended a secular democratic republic where differences should not be permitted to be exploited. ...
>
> 62. ... Dr Radhakrishnan, the noted statesman/philosopher had to say about India being a secular State in the following passage:
>
> "When India is said to be a secular State, it does not mean that we reject reality of an unseen spirit or the relevance of religion to life or that we exalt irreligion. It does not mean that secularism itself becomes a positive religion or that the State assumes divine prerogatives. Though faith in the Supreme is the basic principle of the Indian tradition, the Indian State will not identify itself with or be controlled by any particular religion. We hold that no one religion should be given preferential status, or unique distinction, that no one religion should be accorded special privileges in national life or international relations for that would be a violation of the basic principles of democracy and contrary to the best interests of religion and Government. This view of religious impartiality, of comprehension and forbearance, has a prophetic role to play within the national and international life. No group of citizens shall arrogate to itself rights and privileges, which it denies to others. No person should suffer any form of disability or discrimination because of his religion but all like should be free to share to the fullest degree in the common life. This is the basic principle involved in the separation of church and State." (Emphasis supplied)"

172. The Model Code of Conduct, the views of this Court about appeal to religion, being a corrupt practice, and paragraph-16A of the Symbols Order, empowering the Commission to act in the face of defiance, constitute a powerful weapon in the hands of an independent and impartial Election Commission. Placing the exclusive power to appoint with the Executive, hardly helps.

173. In regard to the Symbols Order, this Court in Shri Sadiq Ali and another v. Election Commission of India, New Delhi and others60, upheld the vires of the Symbols Order. This Court, inter alia, and held as follows:

> "40 ... The Commission is an authority created by the Constitution and according to Article 324, the superintendence, direction and control of the electoral rolls for and the conduct of elections to Parliament and to the Legislature of every State and of elections to the office of President and Vice-President shall be vested in the Commission. The fact that the power of resolving a dispute between two rival groups for allotment of symbol of a political party has been vested in such a high authority would raise a presumption, though rebuttable, and provide a guarantee, though not

> absolute but to a considerable extent, that the power would not be misused but would be exercised in a fair and reasonable manner."

174. It is further found that when the Commission issues directions, it does so on its own behalf and not as a (1972) 4 SCC 664 delegate of some other Authority. This was on the construction of Article 324(1).

175. This Court upheld the power of the Election Commission of India to rescind its Order according recognition to a political party, even without elections having been held in all the States in the country [See Janata Dal (Samajwadi) v. Election Commission of India61].

176. In Indian National Congress (I) v. Institute of Social Welfare and others62, no doubt, this Court took the view that the Election Commission has not been conferred with the express power to deregister a political party registered under Section 29A, on the ground that it violated the Constitution or any undertaking given to the Election Commission at the time of its registration. This Court went on to hold also that while exercising its power to register a political party under Section 29A, the Commission acts quasi-judicially. The Court also set out the three exceptional cases where the Commission could review its (1996 (1) SCC 235 (2002) 5 SCC 685 Order for registering a political party. It includes obtaining registration by practicing fraud or forgery. We may notice that under Paragraph-16A of the Symbols Order, the Commission has been empowered to suspend or withdraw the recognition of a party as a national or a state party, after giving a reasonable opportunity. One of the grounds on which it can be so done is refusal or defiance, apart from failure to observe the provisions of the Model Code of Conduct for Guidance. Therefore, after 1994, enormous powers have been conferred on the Election Commission to ensure compliance with the Model Code of Conduct for Guidance of Political Parties issued by the Election Commission in 1991 or as amended by it from time to time. The power can also be exercised under Paragraph-16A in regard to failure or defiance in the matter of following lawful directions and instructions by the Commission.

177. In Subramanian Swamy v. Election Commission of India through its Secretary63, this Court held that the (2008) 14 SCC 318 purpose of making the Symbols Order was to maintain the purity of elections. The Court highlighted the duty of the Election Commission to hold free, fair and clean elections.

178. Paragraph-18 of the Symbols Order reads as follows:

> "18. Power of Commission to issue instructions and directions. The Commission, may issue instructions and directions-
>
> (a) for the clarification of any of the provisions of this Order;
>
> (b) for the removal of any difficulty which may arise in relation to the implementation of any such provisions; and

> (c) in relation to any matter with respect to the reservation and allotment of symbols and recognition of political parties, for which this Order makes no provision or makes insufficient provision, and provision is in the opinion of the Commission necessary for the smooth and orderly conduct of elections."

179. Dealing with the ambit of paragraph-18, this Court held, inter alia, in Edapaddi K. Palaniswami v. T.T.V. Dhinakaran and others64, as follows:

> "24. Indeed, allotment of an election symbol cannot be claimed as a fundamental right as much as contesting election is not, as observed 64 (2019) 18 SCC 219 in Jyoti Basu v. Debi Ghosal [Jyoti Basu v. Debi Ghosal, (1982) 1 SCC 691] . It is a statutory right. It is also well settled that the Election Commission has plenary powers and could exercise the same to ensure free and fair elections. Clause 18 of the Symbols Order predicates the facet of such plenary power to be exercised by the Election Commission. Clause 18 reads thus :
>
> "18. Power of Commission to issue instructions and directions.—The Commission, may issue instructions and directions—
>
> (a) for the clarification of any of the provisions of this Order;
>
> (b) for the removal of any difficulty which may arise in relation to the implementation of any such provisions; and
>
> (c) in relation to any matter with respect to the reservation and allotment of symbols and recognition of political parties, for which this Order makes no provision or makes insufficient provision, and provision is in the opinion of the Commission necessary for the smooth and orderly conduct of elections."
>
> 25. The Election Commission in the past has exercised plenary powers under Para 18 for issuing interim directions regarding allocation of common symbols to the two factions, when the dispute under the Symbols Order was still pending before it. It was argued that the Election Commission cannot do so once it had finally decided the dispute.

There is no difficulty in agreeing with the proposition that once the dispute had been finally decided by ECI, the question of invoking powers under Para 18 by it (ECI) would not arise. However, if the dispute is pending enquiry before ECI or the final decision of ECI is sub judice in the proceedings before the constitutional court, providing for an equitable arrangement in the interests of free and fair elections and to provide equal level playing field to all concerned, would be a just and fair arrangement."

180. The above observations indicate the width of the powers available to the Election Commission.

181. In Public Interest Foundation and others v. Union of India and others65, a Constitution Bench was invited but refused to add or prescribe disqualifications for contesting the elections other than what was prescribed by the Constitution and the Parliament. In this regard, an appeal made to the existence of plenary power under Article 324 did not pass muster. The attempt was to persuade the Court to direct the Election Commission to disallow a candidate from contesting on the ground that charges have been framed for heinous and/or grievous offences. It was found that the Parliament had the exclusive legislative power to lay down the 65 (2019) 3 SCC 224 disqualifications for the membership of the Legislative Body. It is apposite that we, however, notice the following:

"28. An essential component of a constitutional democracy is its ability to give and secure for its citizenry a representative form of government, elected freely and fairly, and comprising of a polity whose members are men and women of high integrity and morality. This could be said to be the hallmark of any free and fair democracy."

182. This Court, thereafter, quoted from the Goswami Committee on Electoral Reforms, wherein the Committee bemoaned the role of money and muscle power at elections and rapid criminalisation of politics, greatly encouraging evils of booth capturing, rigging and violence. It is important that we notice paragraph- 30:

> "30. Criminalisation of politics was never an unknown phenomenon in the Indian political system, but its presence was seemingly felt in its strongest form during the 1993 Mumbai bomb blasts which was the result of a collaboration of a diffused network of criminal gangs, police and customs officials and their political patrons. The tremors of the said attacks shook the entire nation and as a result of the outcry, a commission was constituted to study the problem of criminalisation of politics and the nexus among criminals, politicians and bureaucrats in India. The report of the Committee, Vohra Committee Report, submitted by Union Home Secretary, N.N. Vohra, in October 1993, referred to several observations made by official agencies, including Central Bureau of Investigation, Intelligence Bureau, Research and Analysis Wing, who unanimously expressed their opinion on the criminal network which was virtually running a parallel government. The Committee also took note of the criminal gangs who carried out their activities under the aegis of various political parties and government functionaries. The Committee further expressed great concern regarding the fact that over the past few years, several criminals had been elected to local bodies, State Assemblies and Parliament. The Report observed:
>
> "3.2. ... In the bigger cities, the main source of income relates to real estate — forcibly occupying lands/buildings, procuring such properties at cheap rates by forcing out the existing occupants/tenants etc. Over time, the money power thus acquired is used for building up contacts with bureaucrats and politicians and expansion of activities with impunity. The money power is used to develop a network of muscle-power which is also used by the politicians during elections." And again:

> "3.3. ... The nexus between the criminal gangs, police, bureaucracy and politicians has come out clearly in various parts of the country. The existing criminal justice system, which was essentially designed to deal with the individual offences/crimes, is unable to deal with the activities of the mafia; the provisions of law in regard economic offences are weak..."

183. We are tempted to quote the following observations by Shri C. Rajagopalachari, made way back in 1922, which has been referred to by the Constitution Bench in Public Interest Foundation (supra):

> "40. ... "... 'Elections and their corruption, injustice and tyranny of wealth, and inefficiency of administration, will make a hell of life as soon as freedom is given to us....'""

184. The Court, in Public Interest Foundation (supra), elaborately quoted from the Two Hundred and Forty- Fourth Report of the Law Commission of India on Electoral Disqualifications. This Court also reiterated the role and, thereafter, the powers of the Election Commission. The Court went on to observe that:

> "115. ...The best available people, as is expected by the democratic system, should not have criminal antecedents and the voters have a right to know about their antecedents, assets and other aspects. We are inclined to say so, for in a constitutional democracy, criminalisation of politics is an extremely disastrous and lamentable situation. The citizens in a democracy cannot be compelled to stand as silent, deaf and mute spectators to corruption by projecting themselves as helpless. The voters cannot be allowed to resign to their fate. The information given by a candidate must express everything that is warranted by the Election Commission as per law. Disclosure of antecedents makes the election a fair one and the exercise of the right of voting by the electorate also gets sanctified. ..."

185. Thereafter, the Constitution Bench went on to hold as follows:

> "116. Keeping the aforesaid in view, we think it appropriate to issue the following directions which are in accord with the decisions of this Court:
>
> 116.1. Each contesting candidate shall fill up the form as provided by the Election Commission and the form must contain all the particulars as required therein.
>
> 116.2. It shall state, in bold letters, with regard to the criminal cases pending against the candidate.
>
> 116.3. If a candidate is contesting an election on the ticket of a particular party, he/she is required to inform the party about the criminal cases pending against him/her.

116.4. The political party concerned shall be obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents.

116.5. The candidate as well as the political party concerned shall issue a declaration in the widely circulated newspapers in the locality about the antecedents of the candidate and also give wide publicity in the electronic media. When we say wide publicity, we mean that the same shall be done at least thrice after filing of the nomination papers.

117. These directions ought to be implemented in true spirit and right earnestness in a bid to strengthen the democratic set-up. There may be certain gaps or lacunae in a law or legislative enactment which can definitely be addressed by the legislature if it is backed by the proper intent, strong resolve and determined will of right-thinking minds to ameliorate the situation. It must also be borne in mind that the law cannot always be found fault with for the lack of its stringent implementation by the authorities concerned.

Therefore, it is the solemn responsibility of all concerned to enforce the law as well as the directions laid down by this Court from time to time in order to infuse the culture of purity in politics and in democracy and foster and nurture an informed citizenry, for ultimately it is the citizenry which decides the fate and course of politics in a nation and thereby ensures that "we shall be governed no better than we deserve", and thus, complete information about the criminal antecedents of the candidates forms the bedrock of wise decision-making and informed choice by the citizenry. Be it clearly stated that informed choice is the cornerstone to have a pure and strong democracy.

118. We have issued the aforesaid directions with immense anguish, for the Election Commission cannot deny a candidate to contest on the symbol of a party. A time has come that Parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream. It is one thing to take cover under the presumption of innocence of the accused but it is equally imperative that persons who enter public life and participate in law making should be above any kind of serious criminal allegation. It is true that false cases are foisted on prospective candidates, but the same can be addressed by Parliament through appropriate legislation. The nation eagerly waits for such legislation, for the society has a legitimate expectation to be governed by proper constitutional governance. The voters cry for systematic sustenance of constitutionalism. The country feels agonised when money and muscle power become the supreme power. Substantial efforts have to be undertaken to cleanse the polluted stream of politics by prohibiting people with criminal antecedents so that they do not even conceive of the idea of entering into politics. They should be kept at bay." It would appear that the grant of relief would have resulted in the rewriting of the provision. Z. INDEPENDENCE; A STERLING AND INDISPENSABLE ATTRIBUTE THE CONCEPT OF LEGITIMATE POWER OF RECIPROCITY

186. What is independence? Independence is a value, which is only one of the elements in the amalgam of virtues that a person should possess. The competence of a man is not to be conflated with fierce independence. A person may be excellent, i.e., at his chosen vocation. He may be an

excellent Administrator. He may be honest but the quality of independence transcends the contours of the qualities of professional excellence, as also the dictates of honesty. We may, no doubt, clarify that, ordinarily, honesty would embrace the quality of courage of conviction, flowing from the perception of what is right and what is wrong. Irrespective of consequences to the individual, an honest person would, ordinarily, unrelentingly take on the high and mighty and persevere in the righteous path. An Election Commissioner is answerable to the Nation. The people of the country look forward to him so that democracy is always preserved and fostered. We may qualify the above observations by stating that true independence of a Body of persons is not to be confused with sheer unilateralism. This means that the Election Commission must act within the Constitutional framework and the laws. It cannot transgress the mandate of either and still claim to be independent. Riding on the horse of independence, it cannot act in an unfair manner either. Independence must be related, finally, to the question of 'what is right and what is wrong'. A person, who is weak kneed before the powers that be, cannot be appointed as an Election Commissioner. A person, who is in a state of obligation or feels indebted to the one who appointed him, fails the nation and can have no place in the conduct of elections, forming the very foundation of the democracy. An independent person cannot be biased. Holding the scales evenly, even in the stormiest of times, not being servile to the powerful, but coming to the rescue of the weak and the wronged, who are otherwise in the right, would qualify as true independence. Upholding the constitutional values, which are, in fact, a part of the Basic Structure, and which includes, democracy, the Rule of Law, the Right to Equality, secularism and the purity of elections otherwise, would, indeed, proclaim the presence of independence. Independence must embrace the ability to be firm, even as against the highest. Not unnaturally, uncompromising fearlessness will mark an independent person from those who put all they hold dear before their Karma. It is in this context that we feel advised to refer to the following discussion in Supreme Court Advocates-on-Record Assn. and another v. Union of India66:

> "310. A little personal research resulted in the revelation of the concept of the "legitimate power of reciprocity" debated by Bertram Raven in his article — "The Bases of Power and the Power/Interaction Model of Interpersonal Influence" (this article appeared in Analyses of Social Issues and Public Policy, Vol. 8, No. 1, 2008, pp. 1-22). In addition to having dealt with various psychological reasons which influenced the personality of an individual, reference was also made to the "legitimate power of reciprocity". It was pointed out that the reciprocity norm envisaged that if someone does something beneficial for another, the recipient would feel an obligation to reciprocate ("I helped you when you needed it, so you should feel obliged to do this for me." — Goranson and Berkowitz, 1966; Gouldner, 1960). In the view expressed by the author, the inherent need of power is universally available in the subconscious of the individual. On the satisfaction and achievement of the desired power, there is a similar unconscious desire to reciprocate the favour." It is important that the appointment must not be overshadowed by even a perception, that a 'yes man' (2016) 5 SCC 1 will decide the fate of democracy and all that it promises. Certainty, the darkest apprehensions of the founding fathers as buttressed by the reports and other materials, unerringly point to the imperative need to act.

AA. THE APPOINTMENT OF SHRI ARUN GOEL: A TRIGGER OR A MERE ASIDE?

187. An application was filed by the petitioner in W.P. No. 569 of 2021 to seek interim relief to provide for appointment to fill a vacancy of Election Commissioner which had arisen on 15.05.2022 by a Committee. The Bench commenced hearing of these cases on 17.11.2022. The matter stood posted to 22.11.2022. It would appear that on 18.11.2022, the vacancy of Election Commissioner came to be filled up by the appointment of one Shri Arun Goel. This appointment was attacked by Shri Prashant Bhushan, learned Counsel appearing for the petitioner, by contending that when the petitioner had moved an application, seeking interim relief relating to appointment, it was not open to the respondent-Union to make the appointment. This Court thereupon called upon the respondent to produce the files relating to the appointment. We perused the note as also the file. It is therein, inter alia, stated that a vacancy in the post of Election Commissioner arose upon the appointment of Shri Rajiv Kumar as the Chief Election Commissioner w.e.f. 15.05.2022. No specific law has been made under Article 324. A convention is put forward, which consisted of appointing senior Members of the Civil Services, other serving or retired Officers of the rank of Secretary to the Government of India/Chief Secretary of State Government. The convention further comprised of the appointment of the senior-most Election Commissioner as the Chief Election Commissioner so far. We found, undoubtedly, from the perusal of the files that the respondent was aware of the pendency of Writ Petition (Civil) No. 104 of 2015 apart from the other Writ Petitions. The appointment has been made apparently on the basis that there was no hinderance to the making of the appointment. Approval was sought on 18.11.2022 for the appointment of one Election Commissioner. On the very same day, drawing upon the database of IAS Officers, serving and retired, in the position of Secretary to the Government of India, it was accessed. We found four names, which included at the top of the list, the present appointee. Three other names were also considered by the Minister of Law and Justice. One of the Officers was from Andhra Pradesh and belonged to the 1983 Batch. The third Officer empanelled belonged to the Telangana State and he belonged to the 1983 Batch and the fourth Officer belonged to the Tamil Nadu cadre and belonged to the 1985 Batch. The present appointee belonged to the Punjab Cadre and was of the 1985 Batch. On the same day, i.e., on 18.11.2022, a Note was seen put-up, wherein the Law Minister had suggested the panel of four names for the consideration of the Prime Minister and the President. Therein also, the absence of a law and the convention, which we have already referred to, has been noted. We further find that three of the Officers mentioned had superannuated during the last two years or so. The appointee, it was noted was to superannuate in the month of December, 2022 and had taken voluntary retirement, was found to be the youngest of the four Members of the panel. It was recommended to the Prime Minister that considering his experience, age, profile and suitability, the current appointee may be considered. On the very same day again, the Prime Minister recommended the name of the present appointee. We notice further that, on the same day again, an application is seen made by the appointee in regard to voluntary retirement and accepting the same, again, w.e.f., 18.11.2022, and waiving the three months period required for acting on the request of voluntary retirement, the Officer's request for voluntary retirement came to be accepted by the Competent Authority. Not coming as a surprise, on the same day, his appointment as Election Commissioner was also notified. We are a little mystified as to how the officer had applied for voluntary retirement on 18.11.2022, if he was not in the know about the proposal to appoint him. Whether that be, we notice that 18.11.2022 was a Friday and very next day, after the Court had directed the case to be

listed to 22.11.2022, for considering the matter.

188. In regard to this appointment, the salient features may be noticed. The vacancy was subsisting from 15.05.2022. The Constitution Bench held a preliminary hearing on 17.11.2022. It was while so on the next day, i.e., 18.11.2022, when an interim application was also pending consideration, all the procedures commencing with the proposal, processing of the same at the hands of the Minister for Law, the further recommendations of the concerned Officers, the recommendation of the Prime Minister, the acceptance of the application of the appointee seeking voluntary retirement, waiving the three months period and the appointment by the President under Article 324(2), which came to be notified, took place in a single day. No doubt, there was no interim Order, restraining such appointment but, at the same time, I.A. No. 63145 of 2021 in Writ Petition (Civil) No. 569 of 2021, seeking a direction to make appointment to the vacant post by an independent Body, was pending consideration. Shri Prashant Bhushan would seek the invalidation of the appointment itself on the said score.

189. Since the Constitution Bench has been constituted to consider the need for a different method of appointment of the Chief Election Commissioner and the Election Commissioners, the procedure involved in the appointment as has been followed throws up certain pertinent questions. Appointment is, admittedly, made from a panel of Senior Civil Servants, both retired and serving. Learned Attorney General would contend that the appointment is made from a panel of Officers. The current appointee was due to retire on 31.12.2022. From the date of birth of the other three persons, who formed the panel, we find that one of the persons had superannuated, apparently, in the year 2020. Another Officer, whose name figured in the panel had also superannuated in the year 2020. The only other Officer, who was considered with the appointee, had also superannuated in the year 2020. As on 18.11.2022, if any of the three were considered and appointed, they would have had a tenure of less than three years. This is for the reason that, under Section 4 of the 1991 Act, an Election Commissioner is entitled to a term of six years, subject, however, to the condition that the Officer would have to vacate the Office upon his reaching the age of 65 years. In fact, even the appointed Officer was due to retire on 31.12.2022, at the age of sixty years. He would have a term of a little over five years, on the basis of the appointment made on 18.11.2022. He would be appointed not as a Chief Election Commissioner but as an Election Commissioner. Both the Chief Election Commissioner and the Election Commissioner, as per Section 4 of the 1991 Act, are to be appointed for a term of six years.

190. This brought up the question of Section 4, declaring a fixed term of six years from the date of assumption of Office, for a Chief Election Commissioner and an Election Commissioner, being observed in its breach. The learned Attorney General would respond as follows. He pointed out that since the time, when the Election Commission became a multi-Member team, a convention has grown up of making appointments of persons, initially as Election Commissioners and the senior-most Election Commissioner, unless considered unfit, is appointed as the Chief Election Commissioner. As far as Section 4, declaring that the Chief Election Commissioner and the Election Commissioner are to be appointed for a term of six years and the appointments falling foul of the said mandate, the learned Attorney General would point out that the term of the Election Commissioner and the term as Chief Election Commissioner, for those who are appointed as the

Chief Election Commissioner, is aggregated. In view of the first proviso to Section 4 of the 1991 Act, a shortfall, in terms of the six years stint, may occur. But it is pointed out that as far as possible, appointments are being made so as to fulfil the requirements of the law. In view of the operation of the proviso, resulting in a compulsory and premature vacating of the Office by the incumbent on attaining the age of 65 years, the term may not last for the full six years, even on the combination of the two appointments, viz., firstly as Election Commissioner and later as Chief Election Commissioner. The learned Attorney General would point out that this Court should not be detained by the said aspect, when the question, which this Court is concerned with, is different. As far as the criticism launched, both by Shri Prashant Bhushan and Shri Gopal Sankaranarayanan, that the panel which was considered, betrayed sheer arbitrariness and reinforced the grievance and the complaint of the Writ Petitioners that an undeniable case is made out for this Court to step in and grant relief so that a fair procedure for selection and appointment is laid down, till a law is made by the Parliament, the learned Attorney General would point out that Civil Servants or IAS Officers are by dint of the experience gathered in the course of their careers, ideally suited for appointment as Election Commissioners and Chief Election Commissioners. They have experience in the matter of the conduct of the elections at different stages of their career. They operate as observers in States other than their cadre States. The Election Commission is not to be conflated with the Chief Election Commissioner and the Election Commissioners. The Commission functions as a large team. It is in this regard that Officers of the Civil Services are impeccably poised for being considered under Article 324(2), it is pointed out.

191. The learned Attorney General would point out that that the panel of Officers, is born out of the database of serving and retired IAS Officers in the position of Secretaries to the Government of India.

192. When it was pointed out that it remained a mystery to the Court that incongruous with the unambiguous mandate of Section 4 of the 1991 Act, all the panellists were either retired (3 out of four) and the person finally appointed was himself appointed, when he had less than a month for his 60th birthday, it was submitted that the Court must bear in mind that the panel was drawn up from the database of Officers in the rank of Secretaries to the Government of India, both serving and retired, and drawn up by the Ministry of Law and Justice. When it was further queried as to why the respondent did not appear to exhibit any anxiety to ascertain whether there were Officers, who could be appointed who would be assured the full term of six years, in keeping with the mandate of law, it was submitted that there is a dearth of such Officers.

193. Thereupon, it was the contention of both Shri Prashant Bhushan and Shri Gopal Shankaranarayan that this may not be the case. It is pointed out by Shri Prashant Bhushan that there are 160 Officers, who belonged to the 1985 Batch and some of them are younger than Shri Arun Goel.

194. We have noted that the three Officers in the panel were described and edged out, noting the factum of superannuation. On the said basis, it was found that the appointee was the youngest. Thereafter on the basis of his experience, age and suitability, the appointee was recommended and finally appointed.

195. If the drawing up of the panel itself results in a fate accompli, then, the whole exercise would be reduced to a foregone conclusion as to who would be finally appointed. What we find about the method involved is, even proceeding on the basis that the Government has the right to confine the appointee to Civil Servants, that it is in clear breach of the contemplated mandate that be it as an Election Commissioner or Chief Election Commissioner, the appointee should have a period of six years. The philosophy behind giving a reasonably long stint to the appointee to the post of Election Commissioner or the Chief Election Commissioner, is that it would enable the Officer to have enough time to gear himself to the needs of the Office and to be able to assert his independence. An assured term would instil in the appointee, the inspiration and the will to put in place any reforms, changes, as also the inspiration to bring out his best. A short-lived stint may drain the much- needed desire besides the time to fulfil the sublime objects of the high Office of the Election Commissioner or the Chief Election Commissioner. Any tendency towards placating the powers that be, would wax as also the power and the will to assert his independence may wane, bearing in mind, the short tenure. This apparently is the underlying philosophy of the law made by Parliament, assuring, a term of six years. The term of six years is separately assured to both the Election Commissioner and the Chief Election Commissioner. In other words, the object of the law and its command would stand defeated and the practice lends strength to the complaint of the petitioners. We must make it clear that the observations are not meant to be an individualised assessment of the appointee, who we do note, has excellent academic qualifications. But as we have noted academic excellence which members of the civil service may possess cannot be a substitute for values such as independence and freedom from bias from political affiliation. We draw the following conclusions:

> Parliament enshrined a term of six years separately for the Chief Election Commissioner and the Election Commissioner. This is the Rule, it is found in Section 4(1). A proviso cannot arrogate itself to the status of the main provision. The exception cannot become the Rule. Yet, this what the appointments have been reduced to. It undermines the independence of the Election Commission. The policy of the law is defeated.
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> BB. IS THERE A VACUUM IN ARTICLE 324? SHOULD THE COURT INTERFERE, IF THERE IS ONE?

196. When Article 324(2) provides that the appointment of the Chief Election Commissioner and the other Election Commissioners shall, subject to the provisions of any law, made in that behalf by Parliament, be made by the President, in view of Article 74, it would, undoubtedly, mean that the President is bound to make appointments in accordance with the advice of the Council of Ministers. Taking into consideration Article 77 also and, in view of the Rules of Business made, which we have referred to in paragraph 51 of this Judgment, the appointment, till a law is made by Parliament, would be made by the President in accordance with advice of the Prime Minister. It was precisely such an appointment, which was the cause of unanimous concern to the Members of the Constituent Assembly, which we have already adverted to.

197. The petitioners placed considerable reliance on the Judgment of this Court rendered in Vineet Narain and others v. Union of India and another67. No doubt, it is a case where the Court, inter alia,

held as follows:

> "49. There are ample powers conferred by Article 32 read with Article 142 to make orders which have the effect of law by virtue of Article 141 and there is mandate to all authorities to act in aid of the orders of this Court as provided in Article 144 of the Constitution. In a catena of decisions of this Court, this power has been recognised and exercised, if need be, by issuing necessary directions to fill the vacuum till such time the legislature steps in to cover the gap or the executive discharges its role. It is in the discharge of this duty that the IRC was constituted by the Government of India with a view to obtain its recommendations after an in- depth study of the problem in order to implement them by suitable executive (1998) 1 SCC 226 directions till proper legislation is enacted.

The report of the IRC has been given to the Government of India but because of certain difficulties in the present context, no further action by the executive has been possible. The study having been made by a Committee considered by the Government of India itself as an expert body, it is safe to act on the recommendations of the IRC to formulate the directions of this Court, to the extent they are of assistance. In the remaining area, on the basis of the study of the IRC and its recommendations, suitable directions can be formulated to fill the entire vacuum. This is the exercise we propose to perform in the present case since this exercise can no longer be delayed. It is essential and indeed the constitutional obligation of this Court under the aforesaid provisions to issue the necessary directions in this behalf. We now consider formulation of the needed directions in the performance of this obligation. The directions issued herein for strict compliance are to operate till such time as they are replaced by suitable legislation in this behalf."

198. We must, at once, notice, however, that this Court has also held as follows:

> "51. In exercise of the powers of this Court under Article 32 read with Article 142, guidelines and directions have been issued in a large number of cases and a brief reference to a few of them is sufficient. In Erach Sam Kanga v. Union of India [WP No. 2632 of 1978 decided on 20-3-1979] the Constitution Bench laid down certain guidelines relating to the Emigration Act. In Lakshmi Kant Pandey v. Union of India [(1984) 2 SCC 244] (In re, Foreign Adoption), guidelines for adoption of minor children by foreigners were laid down. Similarly in State of W.B. v. Sampat Lal [(1985) 1 SCC 317 : 1985 SCC (Cri) 62 : (1985) 2 SCR 256] , K. Veeraswami v. Union of India [(1991) 3 SCC 655 : 1991 SCC (Cri) 734] , Union Carbide Corpn. v. Union of India [(1991) 4 SCC 584] , Delhi Judicial Service Assn. v. State of Gujarat [(1991) 4 SCC 406] (Nadiad case), Delhi Development Authority v. Skipper Construction Co. (P) Ltd. [(1996) 4 SCC 622] and Dinesh Trivedi, M.P. v. Union of India [(1997) 4 SCC 306] guidelines were laid down having the effect of law, requiring rigid compliance. In Supreme Court Advocates-on-

Record Assn. v. Union of India [(1993) 4 SCC 441] (IInd Judges case) a nine-Judge Bench laid down guidelines and norms for the appointment and transfer of Judges which are being rigidly followed in

the matter of appointments of High Court and Supreme Court Judges and transfer of High Court Judges. More recently in Vishaka v. State of Rajasthan [(1997) 6 SCC 241 : 1997 SCC (Cri) 932] elaborate guidelines have been laid down for observance in workplaces relating to sexual harassment of working women.

In Vishaka [(1997) 6 SCC 241 : 1997 SCC (Cri) 932] it was said: (SCC pp. 249-50, para 11) "11. The obligation of this Court under Article 32 of the Constitution for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region. These principles were accepted by the Chief Justices of Asia and the Pacific at Beijing in 1995 (*) (As amended at Manila, 28th August, 1997) as those representing the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objectives of the judiciary mentioned in the Beijing Statement are:

> "Objectives of the Judiciary:
>
> 10. The objectives and functions of the Judiciary include the following:
>
> (a) to ensure that all persons are able to live securely under the rule of law;
>
> (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
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> (c) to administer the law impartially among persons and between persons and the State." Thus, an exercise of this kind by the court is now a well-settled practice which has taken firm roots in our constitutional jurisprudence. This exercise is essential to fill the void in the absence of suitable legislation to cover the field."
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> 199. It, therefore, becomes necessary for us to undertake a journey back in time to recapture the views taken by this Court, which has been referred to in paragraph-51. In Lakshmi Kant Pandey v. Union of India68, this Court was dealing a public interest litigation lodged against malpractices in trafficking of children in connection with adoption of Indian children by foreigners living abroad. The Court noted from the legislative history that though Bills were introduced, including the Adoption of Children Bill, (1984) 2 SCC 244 1980, besides the earlier Bill in 1972, it had not attained a legislative effect. The Court found that inter-country adoption had to be supported but great care had to be exercised in the matter of giving children in adoption to foreign parents. The Court referred to, inter alia, the draft Declaration by the Commission for Social Development at its twenty-sixth session, besides the guidelines and draft guidelines, which were approved on 04.09.1982. The Court notes, at paragraph-10, the absence of a law providing for adoption of an Indian child by the foreign parent.

Thereafter, it elaborated on the materials available and finally proceeded to lay down certain principles and norms which were to be observed in the matter of giving a child in adoption to foreign parents.

200. In Union Carbide Corporation and others. v. Union of India and others69, one of the questions, which fell for consideration was whether the Supreme Court had the power under Article 142 to withdraw to itself, Original Suits pending in the District Court at Bhopal and (1991) 4 SCC 584 dispose of the same in accordance with the settlement. Similarly, the Court had to deal with the contention that it had no jurisdiction to withdraw the criminal proceedings. This is what, inter alia, the Court held:

> "58. This Court had occasion to point out that Article 136 is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing of appeals by granting special leave against any kind of judgment or order made by a Court or Tribunal in any cause or matter and the powers can be exercised in spite of the limitations under the specific provisions for appeal contained in the Constitution or other laws. The powers given by Article 136 are, however, in the nature of special or residuary powers which are exercisable outside the purview of the ordinary laws in cases where the needs of justice demand interference by the Supreme Court. (See Durga Shankar Mehta v. Thakur Raghuraj Singh [(1955) 1 SCR 267 : AIR 1954 SC 520 : 9 ELR 494]).
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> xxx xxx xxx
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> 61. To the extent power of withdrawal and transfer of cases to the apex Court is, in the opinion of the Court, necessary for the purpose of effectuating the high purpose of Articles 136 and 142(1), the power under Article 139-A must be held not to exhaust the power of withdrawal and transfer. Article 139-A, it is relevant to mention here, was introduced as part of the scheme of the Constitution Forty-

second Amendment. That amendment proposed to invest the Supreme Court with exclusive jurisdiction to determine the constitutional validity of central laws by inserting Articles 131-A, 139-A and 144-A. But Articles 131-A and 144-A were omitted by the Forty-third Amendment Act, 1977, leaving Article 139-A intact. That article enables the litigants to approach the apex Court for transfer of proceedings if the conditions envisaged in that article are satisfied. Article 139-A was not intended, nor does it operate, to whittle down the existing wide powers under Articles 136 and 142 of the Constitution."

201. In Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat and others70, the question arose in the following factual context:

> Police Officers assaulted and arrested on flimsy grounds and handcuffed and tied with a rope, a Chief Judicial Magistrate. The scope of the Criminal Contempt Jurisdiction fell for consideration. This Court wished to provide against the

recurrence of such instances.

The Court directed the State Government to take immediate steps for review and revision of the Police Regulations. In the light of the Commission appointed, the Court held, inter alia, as follows:

"49. Learned counsel, appearing on behalf of the State of Gujarat and the police officers, urged that in the present proceedings this Court has no jurisdiction or power to quash the criminal proceedings pending against N.L. (1991) 4 SCC 406 Patel, CJM. Elaborating his contention, learned counsel submitted that once a criminal case is registered against a person the law requires that the court should allow the case to proceed to its normal conclusion and there should be no interference with the process of trial. He further urged that this Court has no power to quash a trial pending before the criminal court either under the Code of Criminal Procedure or under the Constitution, therefore, the criminal proceedings pending against Patel should be permitted to continue.

Learned Attorney General submitted that since this Court has taken cognizance of the contempt matter arising out of the incident which is the subject matter of trial before the criminal court, this Court has ample power under Article 142 of the Constitution to pass any order necessary to do justice and to prevent abuse of process of the court. The learned Attorney General elaborated that there is no limitation on the power of this Court under Article 142 in quashing a criminal proceeding pending before a subordinate court. Before we proceed to consider the width and amplitude of this Court's power under Article 142 of the Constitution it is necessary to remind ourselves that though there is no provision like Section 482 of the Criminal Procedure Code conferring express power on this Court to quash or set aside any criminal proceedings pending before a criminal court to prevent abuse of process of the court, but this Court has power to quash any such proceedings in exercise of its plenary and residuary power under Article 136 of the Constitution, if on the admitted facts no charge is made out against the accused or if the proceedings are initiated on concocted facts, or if the proceedings are initiated for oblique purposes. Once this Court is satisfied that the criminal proceedings amount to abuse of process of court it would quash such proceedings to ensure justice. In State of W.B. v. Swapan Kumar Guha [(1982) 1 SCC 561 : 1982 SCC (Cri) 283 : (1982) 3 SCR 121] , this Court quashed first information report and issued direction prohibiting investigation into the allegations contained in the FIR as the Court was satisfied that on admitted facts no offence was made out against the persons named in the FIR. In Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre [(1988) 1 SCC 692 : 1988 SCC (Cri) 234] , criminal proceedings were quashed as this Court was satisfied that the case was founded on false facts, and the proceedings for trial had been initiated for oblique purposes.

50. Article 142(1) of the Constitution provides that Supreme Court in exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any 'cause' or 'matter' pending before it. The expression 'cause' or 'matter' would include any proceeding pending in court and it would cover almost every kind of proceeding in court including civil or criminal. The inherent power of this Court under Article 142 coupled with the plenary and residuary powers under

Articles 32 and 136 embraces power to quash criminal proceedings pending before any court to do complete justice in the matter before this Court. If the court is satisfied that the proceedings in a criminal case are being utilised for oblique purposes or if the same are continued on manufactured and false evidence or if no case is made out on the admitted facts, it would be in the ends of justice to set aside or quash the criminal proceedings. It is idle to suggest that in such a situation this Court should be a helpless spectator.

51. Mr Nariman urged that Article 142(1) does not contemplate any order contrary to statutory provisions. He placed reliance on the Court's observations in Prem Chand Garg v. Excise Commissioner, U.P., Allahabad [1963 Supp 1 SCR 885, 899 : AIR 1963 SC 996] and A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] , where the Court observed that though the powers conferred on this Court under Article 142(1) are very wide, but in exercise of that power the Court cannot make any order plainly inconsistent with the express statutory provisions of substantive law. It may be noticed that in Prem Chand Garg [1963 Supp 1 SCR 885, 899 : AIR 1963 SC 996] and Antulay case [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] observations with regard to the extent of this Court's power under Article 142(1) were made in the context of fundamental rights. Those observations have no bearing on the question in issue as there is no provision in any substantive law restricting this Court's power to quash proceedings pending before subordinate court. This Court's power under Article 142(1) to do “complete justice” is entirely of different level and of a different quality. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of this Court. Once this Court has seisin of a cause or matter before it, it has power to issue any order or direction to do “complete justice” in the matter. This constitutional power of the Apex Court cannot be limited or restricted by provisions contained in statutory law.

In Harbans Singh v. State of U.P. [(1982) 2 SCC 101 : 1982 SCC (Cri) 361 : (1982) 3 SCR 235, 243] , A.N. Sen, J. in his concurring opinion observed: (SCC pp. 107-08, para 20) “Very wide powers have been conferred on this Court for due and proper administration of justice. Apart from the jurisdiction and powers conferred on this Court under Articles 32 and 136 of the Constitution I am of the opinion that this Court retains and must retain, an inherent power and jurisdiction for dealing with any extraordinary situation in the larger interests of administration of justice and for preventing manifest injustice being done. This power must necessarily be sparingly used only in exceptional circumstances for furthering the ends of justice.” No enactment made by Central or State legislature can limit or restrict the power of this Court under Article 142 of the Constitution, though while exercising power under Article 142 of the Constitution, the Court must take into consideration the statutory provisions regulating the matter in dispute. What would be the need of “complete justice” in a cause or matter would depend upon the facts and circumstances of each case and while exercising that power the Court would take into consideration the express provisions of a substantive statute. Once this Court has taken seisin of a case, cause or matter, it has power to pass any order or issue direction as may be necessary to do complete justice in the matter. This has been the consistent view of this Court as would appear from the decisions of this Court in State of U.P. v. Poosu [(1976) 3 SCC 1 : 1976 SCC (Cri) 368 : (1976) 3 SCR 1005] ; Ganga Bishan v. Jai Narain [(1986) 1 SCC 75] ; Navnit R. Kamani v. R.R. Kamani [(1988) 4 SCC 387] ; B.N. Nagarajan v. State of Mysore [(1966) 3 SCR 682 : AIR 1966 SC 1942 : (1967) 1 LLJ 698] ; Special Reference No. 1 of 1964

[(1965) 1 SCR 413, 499 : AIR 1965 SC 745] and Harbans Singh v. State of U.P. [(1982) 2 SCC 101 : 1982 SCC (Cri) 361 : (1982) 3 SCR 235, 243] Since the foundation of the criminal trial of N.L. Patel is based on the facts which have already been found to be false, it would be in the ends of justice and also to do complete justice in the cause to quash the criminal proceedings. We accordingly quash the criminal proceedings pending before the Chief Judicial Magistrate, Nadiad in Criminal Cases Nos. 1998 of 1990 and 1999 of 1990."

202. It issued various guidelines also for the protection of the Members of the Subordinate Judiciary. The decision in Supreme Court Advocates-on-Record Association and others v. Union of India71 related to the appointment of Judges to the Supreme Court and High Court and transfer of Judges and Chief Justices. In the majority opinion of Justice J. S. Verma, we may notice the following:

> "447. When the Constitution was being drafted, there was general agreement that the appointments of Judges in the superior judiciary should not be left to the absolute discretion of the executive, and this was the reason for the provision made in the Constitution imposing the obligation to consult the Chief Justice of India and the Chief Justice of the High Court. This was done to achieve independence of the Judges of the superior judiciary even at the time of their appointment, instead of confining it only to the provision of security of tenure and other conditions of service after the appointment was made. It was realised that the independence of the judiciary had to be safeguarded not merely by providing security of tenure and other conditions of service after the appointment, but also by preventing the influence of political considerations in making the (1993) 4 SCC 441 appointments, if left to the absolute discretion of the executive as the appointing authority. It is this reason which impelled the incorporation of the obligation of consultation with the Chief Justice of India and the Chief Justice of the High Court in Articles 124(2) and 217(1). The Constituent Assembly Debates disclose this purpose in prescribing for such consultation, even though the appointment is ultimately an executive act." (Emphasis Supplied)

203. We may at once observe as follows:

> We have noticed in the context of the Constituent Assembly debates, as also what preceded it in the form of Sub-Committee Reports, that there was general agreement that a law must be made by Parliament and the amended draft Article 289 came to be, accordingly, further amended and approved, leading to the insertion of the words 'subject to the law to be made by Parliament' in Article 324(2). In other words, the purpose for which the provision was made, as also the imperative need to make such a law, has been eloquently articulated in the views of the Members of the Constituent Assembly. The appointment of Judges of the Superior Judiciary under the Government of India Act, which preceded the Constitution, was being made in the absolute discretion of the Crown. This Court took note of the fact that if left to the absolute discretion of the Executive, as the appointing Authority, it may lead to

political considerations in making the appointment.

Article 124(2) dealing with appointments to the Supreme Court and Article 217(1) which deals with appointments to the High Courts, was to be made based on what was described as 'consultations' in these Articles. It will be again noticed that Article 324(2), does not provide for consultation with any one and it appears to place the power to make appointments, exclusively with the Executive as the President is bound by the advice of the Prime Minister. However, it is precisely to guard against the abuse by the exclusive power being vested with the Executive that instead of a consultative process being provided, Parliament was to make a law.

This clearly was the contemplation of the Founding Fathers. This Court proceeded to lay down norms in the absence of any specific guidelines. We may, in this regard, notice paragraph-477:

"477. The absence of specific guidelines in the enacted provisions appears to be deliberate, since the power is vested in high constitutional functionaries and it was expected of them to develop requisite norms by convention in actual working as envisaged in the concluding speech of the President of the Constituent Assembly. The hereinafter mentioned norms emerging from the actual practice and crystallized into conventions — not exhaustive — are expected to be observed by the functionaries to regulate the exercise of their discretionary power in the matters of appointments and transfers."

204. We may also indicate that this Judgment provides a situation where this Court has laid down norms, even in the constitutional realm.

205. It is further of the greatest moment that this Court noted that it was realised that independence of the Judiciary had to be protected not merely after appointment but by the process of appointment. The Chief Election Commissioner can also be removed only in the same fashion as a Judge of the Supreme Court. His conditions of service cannot be varied to his disadvantage. But unlike the Comptroller and Auditor General, who also enjoys protection after appointment, the Founding Fathers clearly intended to also provide for an independent Election Commission regulating by law, the appointment itself. This is in place of consultation provided for Judges.

206. In Vishaka and others v. State of Rajasthan and others72, a Writ Petition was filed for enforcement of Fundamental Rights of working women under Articles 14, 19 and 21. The complaint in the Writ Petition was sexual harassment of working women at work places. An alleged brutal gangrape of a social worker provided, what may be described as, an immediate trigger. This Court went on to find that an incident of sexual harassment violated the Fundamental Rights of General Equality, under Articles 14 and 15, and a Right to Life and Liberty, under Article 21. The Court drew support from the role of the Judiciary in the Beijing Statement of Principles of the Independence of Judiciary in Law Asia Region. We may set down the objectives, which the Court drew upon, inter alia:

"Objectives of the Judiciary:

10. The objectives and functions of the Judiciary include the following:

(a) to ensure that all persons are able to live securely under the rule of law;

(1997) 6 SCC 241

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State."

207. The Court also drew on an International Convention providing for elimination of all forms of discrimination against women. Finally, on the basis of the Principle that when there is no inconsistency between a Convention and a Domestic Law and there is a void in the Domestic Law, and bearing in mind the meaning and content of the Fundamental Rights, the Court went on to lay down elaborate guidelines and norms. The norms included as to what constituted sexual harassment, inter alia. This Court went on to even provide for disciplinary action to be initiated and a complaint mechanism. The guidelines were, however, made binding and enforceable in law, until suitable legislation was enacted. The norms enunciated by this Court, which may have been legislative in nature, interestingly, held the field for more than fifteen years, when Parliament came out with a law.

208. In Special Reference No. 1 of 1998, Re73 (The Third Judges case), which no doubt, was a Judgement rendered in a Reference made under Article 143(1) of the Constitution, one of the contentions was, whether the expression, both in Articles 217(1) and 222(1), viz., (consultation with the Chief Justice of India required consultation with the plurality of Judges or the sole opinion of the Chief Justice sufficed), this Court went on to answer the question that the sole individual opinion of the Chief Justice would not constitute 'consultation'. It was also laid down that the Chief Justice of India must consult four senior-most puisne Judges before making appointment to the Supreme Court and High Courts. No doubt, it could be said that the decisions [the Judges cases] could be said to have sprouted from the construction of the words used in the relevant Articles and, in particular, the word 'consult'. Also, it is true that Article 124(2) as it stood then, read as follows:

"124(2). Every Judge of the Supreme Court shall be appointed by the President by warrant under (1998) 7 SCC 739 his hand and seal after consultation with such of the Judges of the Supreme Court and of High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case appointment of a Judge other than the Chief Justice, the Chief Justice of India shall always be consulted:

Provided further that –

(a) A Judge may, by writing under his hand addressed to the President, resign his office;

(b) A judge may be removed from his office in the manner provided in clause (4).” (Emphasis supplied)

209. What is of relevance is, however, the elaboration of the procedure, as regards consultation, and the laying down of norms, which were to govern the appointment to the Superior Judiciary. The mandate to consult four may appear to crystalize a figure not to be found in the Constitution.

210. In fact, we may observe that the Doctrine of Separation of Powers has spawned decisions of this Court largely in the context of litigation where challenges led to actions by the Legislative Organ, allegedly contravening the limits set for it. This is not to say that we are holding that it would be open to the courts to be oblivious to the true role it is called upon to perform and which flows from the judicial function that it discharges. As noticed by this Court, however, there is no magic formula and what it all amounts to is, the need to maintain a delicate balance. While, it is true that, ordinarily, the Court cannot, without anything more, usurp what is purely a legislative power or function, in the context of the Constitution, which clothes the citizens with Fundamental Rights and provides for constitutional goals to be achieved and inertia of the Legislative Department producing a clear situation, where there exist veritable gaps or a vacuum, the Court may not shy away from what essentially would be part of its judicial function.

211. A Writ Petition was filed under Article 32 of the Constitution assailing the appointment of certain Ministers despite their involvement in serious and heinous crimes. The Constitution Bench of this Court in Manoj Narula v. Union of India74 went on to refer to the criminalisation of politics as being an anathema (2014) 9 SCC 1 for the sanctity of democracy. Of immediate interest to this Court, are the following observations:

“Principle of constitutional silence or abeyance

65. The next principle that can be thought of is constitutional silence or silence of the Constitution or constitutional abeyance. The said principle is a progressive one and is applied as a recognised advanced constitutional practice. It has been recognised by the Court to fill up the gaps in respect of certain areas in the interest of justice and larger public interest.

Liberalisation of the concept of locus standi for the purpose of development of public interest litigation to establish the rights of the have-nots or to prevent damages and protect environment is one such feature. Similarly, laying down guidelines as procedural safeguards in the matter of adoption of Indian children by foreigners in Laxmi Kant Pandey v. Union of India [(1987) 1 SCC 66 :

> 1987 SCC (Cri) 33 : AIR 1987 SC 232] or issuance of guidelines pertaining to arrest in D.K. Basu v. State of W.B. [(1997) 1 SCC 416 : 1997 SCC (Cri) 92 : AIR 1997 SC 610] or directions issued in Vishaka v. State of Rajasthan [(1997) 6 SCC 241 : 1997 SCC (Cri) 932] are some of the instances."
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> 212. In Bhanumati and others v. State of U.P. through its Principal Secretary and others75, pronouncing a State Law providing for No Confidence Motion as valid, a Bench of this Court, inter alia, held as follows:
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> (2010) 12 SCC 1 "50. The learned author elaborated this concept further by saying, "Despite the absence of any documentary or material form, these abeyances are real and are an integral part of any Constitution. What remains unwritten and indeterminate can be just as much responsible for the operational character and restraining quality of a Constitution as its more tangible and codified components." (P. 82)
>
> 51. Many issues in our constitutional jurisprudence evolved out of this doctrine of silence. The basic structure doctrine vis-à-

vis Article 368 of the Constitution emerged out of this concept of silence in the Constitution. A Constitution which professes to be democratic and republican in character and which brings about a revolutionary change by the Seventy- third Constitutional Amendment by making detailed provision for democratic decentralisation and self-government on the principle of grass-root democracy cannot be interpreted to exclude the provision of no- confidence motion in respect of the office of the Chairperson of the panchayat just because of its silence on that aspect."

213. In Kalpana Mehta and others v. Union of India and others76, a Constitution Bench of this Court, inter alia, held as follows:

> "51. The Constitution being an organic document, its ongoing interpretation is permissible. The supremacy of the Constitution (2018) 7 SCC 1 is essential to bring social changes in the national polity evolved with the passage of time. The interpretation of the Constitution is a difficult task. While doing so, the constitutional courts are not only required to take into consideration their own experience over time, the international treaties and covenants but also keep the doctrine of flexibility in mind. It has been so stated in Union of India v. Naveen Jindal [Union of India v. Naveen Jindal, (2004) 2 SCC 510].
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> XXX XXX XXX

> 53. Recently, in K.S. Puttaswamy v. Union of India [K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1], one of us (Dr D.Y. Chandrachud, J.) has opined that constitutional developments have taken place as the words of the Constitution have been interpreted to deal with new exigencies requiring an expansive reading of liberties and freedoms to preserve human rights under the Rule of Law. It has been further observed that the interpretation of the Constitution cannot be frozen by its original understanding, for the Constitution has evolved and must continuously evolve to meet the aspirations and challenges of the present and the future. The duty of the constitutional courts to interpret the Constitution opened the path for succeeding generations to meet the challenges. Be it stated, the Court was dealing with privacy as a matter of fundamental right." (Emphasis supplied) In case of Article 324(2), it was the original understanding itself that law be made. This understanding has received reinforcement by subsequent developments, including objective reports.

214. Equally, we may notice what this Court, in Manoj Narula (supra), held as regards constitutional morality:

> "74. The Constitution of India is a living instrument with capabilities of enormous dynamism. It is a Constitution made for a progressive society. Working of such a Constitution depends upon the prevalent atmosphere and conditions. Dr Ambedkar had, throughout the debate, felt that the Constitution can live and grow on the bedrock of constitutional morality. Speaking on the same, he said:
>
> "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-
>
> dressing on an Indian soil, which is essentially undemocratic." [Constituent Assembly Debates, 1948, Vol. VII, 38.]"

215. 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.

216. No law, however, came to be enacted by Parliament. We have elaborately referred to the noises and voices eloquently and without a discordant note being struck, which points to an overpowering symphony, which calls for the immediate need to fulfil the intention of the Founding Fathers, starting with the Goswami Committee in the year 1990, more than three decades ago, the Two Hundred and Fifty-Fifth Central Law Commission Report in 2015 and the Reports, both in the Press and other materials.

217. It may be true that Election Commission of India provide its services to certain countries. That, however, cannot deflect this Court from providing for what the Founding Fathers contemplated also and advocated by in various reports.

218. It may be true only Chief Election Commissioners were appointed for the first four decades of the Republic and, thereafter, since the year 1993, the Election Commission has become a team, which consists of the Chief Election Commissioner and the two Election Commissioners. It may be true that in the sense that the President, acting on the advice of the Prime Minister, in accordance with the concerned Rules of Business, has been making appointments.

219. However, it is equally clear that Article 324 has a unique background. The Founding Fathers clearly contemplated a law by Parliament and did not intend the executive exclusively calling the shots in the matter of appointments to the Election Commission. Seven decades have passed by. Political dispensations of varying hues, which have held the reigns of power have not unnaturally introduced a law. A law could, not be one to perpetuate what is already permitted namely appointment at the absolute and sole discretion of the Executive. A law, as Gopal Sankaranarayanan points out, would have to be necessarily different. The absence of such a law does create a void or vacuum. This is despite a chorus of voices even cutting across the political divide urging divesting of the exclusive power of appointment from the Executive.

220. We have noticed, that while making a law is ordinarily a power with the legislative branch and being a power, it cannot be compelled by a Court, the making of law may be a constitutional imperative. In the context of Article 326, making of law as contemplated in Article 326, was an unavoidable necessity. Realising that the statutory framework was necessary to breathe life into Article 326 and which was not to be incongruous with this command, Parliament enacted the 1950 Act and the 1951 Act. The first General Election followed. Making of law by Parliament as provided for in Article 146 and Article 229 dealing with conditions of service of employees of the Supreme Court and the High Court respectively, was and is a sheer power and enabling provision. The context and the purpose signals no imperative need. No intention to indeed peremptorily provide for a law as is discernible in the case of appointment of the members of the Election Commission of India pervades the Articles. The vacuum in the case of Article 324 (2) is the absence of the law which Parliament was contemplated to enact.

221. Political parties undoubtedly would appear to betray a special interest in not being forthcoming with the law. The reasons are not far to seek. There is a crucially vital link between the independence of the Election Commission and the pursuit of power, its consolidation and perpetuation.

222. As long as the party that is voted into power is concerned, there is, not unnaturally a near insatiable quest to continue in the saddle. A pliable Election Commission, an unfair and biased overseer of the foundational exercise of adult franchise, which lies at the heart of democracy, who obliges the powers that be, perhaps offers the surest gateway to acquisition and retention of power.

223. The values that animated the freedom struggle had to be brought home to a new generation through the insertion of the provision relating to fundamental duties. Criminalisation of politics, a

huge surge in the influence of money power, the role of certain sections of the media where they appear to have forgotten their invaluable role and have turned unashamedly partisan, call for the unavoidable and unpostponable filling up of the vacuum. Even as it is said that justice must not only be done but seen to be done, the outpouring of demands for an impartial mode of appointment of the Members require, at the least, the banishing of the impression, that the Election Commission is appointed by less than fair means.

224. We bear in mind the fact that the demand for putting in place safeguards to end the pernicious effects of the exclusive power being vested with the Executive to make appointment to the Election Commission, has been the demand of political parties across the board. Once power is assumed, however, the fact of the matter is that, despite the concerns of the Founding Fathers and the availability of power, successive governments have, irrespective of their colour, shied away, from undertaking, what again we find was considered would be done by Parliament, by the Founding Fathers.

225. The electoral scene in the country is not what it was in the years immediately following the country becoming a Republic. Criminalisation of politics, with all its attendant evils, has become a nightmarish reality. The faith of the electorate in the very process, which underlies democracy itself, stands shaken. The impact of 'big money' and its power to influence elections, the influence of certain sections of media, makes it also absolutely imperative that the appointment of the Election Commission, which has been declared by this Court to be the guardian of the citizenry and its Fundamental Rights, becomes a matter, which cannot be postponed further.

226. While this Court is neither invited nor if it is invited, would issue a Mandamus to the Legislature to make a law, as contemplated in Article 324(2), it may not be the end of the duty of this Court in the context of the provision in question. We have already elaborated and found that core values of the Constitution, including democracy, and Rule of Law, are being undermined. It is also intricately interlinked with the transgression of Articles 14 and 19. Each time, on account of a 'knave', in the words of Dr. Ambedkar, or again in his words, 'a person under the thumb of the Executive', calls the shots in the matter of holding the elections, which constitutes the very heart of democracy, even formal democracy, which is indispensable for a Body Polity to answer the description of the word 'democracy', is not realised.

227. In the unique nature of the provision, we are concerned with and the devastating effect of continuing to leave appointments in sole hands of the Executive on fundamental values, as also the Fundamental Rights, we are of the considered view that the time is ripe for the Court to lay down norms. In other words, the vacuum exists on the basis that unlike other appointments, it was intended all throughout that appointment exclusively by the Executive was to be a mere transient or stop gap arrangement and it was to be replaced by a law made by the Parliament taking away the exclusive power of the Executive. This conclusion is clear and inevitable and the absence of law even after seven decades points to the vacuum.

228. Article 148 of the Constitution, dealing with appointment of the Comptroller and Auditor General of India, provides that it is to be made by the President. This is to be contrasted with the

appointment of the Members of the Election Commission in Article 324(2). On a comparison of both the Articles, the difference is stark and would justify the petitioners contention that in regard to the appointment of the Members of the Election Commission, having regard to the overwhelming importance and the nearly infinite plenary powers, they have in regard to the most important aspect of democracy itself, viz., the holding of free and fair elections, the Founding Fathers have provided for the unique method of appointment suited to the requirements of the posts in question. The refusal of Parliament, despite what was contemplated by the Founding Fathers, and what is more, the availability of a large number of Reports, all speaking in one voice, reassures us that even acting within the bounds of the authority available to the Judicial Branch, we must lay down norms, which, undoubtedly, must bear life only till Parliament steps in. We have found, how appointments are being made in our discussion earlier. Our minds stand fortified that there is an imperative need for the Court to step in.

229. As regards the exact norm, which should be put in place, we bear in mind the following considerations:

> We have before us the various Reports, which we have referred to. We would think that, while what must be laid down, must be fair and reasonable, but it must be what Parliament would or could lay down, if it were to make a law. Under the Rules of Business made under Article 77, it is acknowledged that the appointment of the Chief Election Commissioner and the Election Commissioners do not engage the Cabinet. We take note of the fact that for the appointment to the Director of the Central Bureau of Investigation [which is not a constitutional post], Section 4A of Delhi Special Police Establishment Act, 1946, contemplates that appointment shall be made by the Central Government on the basis of recommendation of a committee consisting of the Prime Minister as the Chairperson, the Leader of the Opposition recognised in the House of People, as such, or where there is no such Leader of the Opposition, then, the Leader of the Single Largest Opposition Party in the House and the Chief Justice of India or a Judge of the Supreme Court nominated by him.
>
> Similarly, we find, in regard to the appointment of the Chairperson and Members of the Lokpal, under the Lokpal and Lokayuktas Act, 2013, the Chief Justice is one of the five Members of a Selection Committee, in the matter of appointment. We deem it appropriate to notice Section 4 of the Lokpal and Lokayuktas Act, 2013, which reads as follows:
>
> "4. (1) The Chairperson and Members shall be appointed by the President after obtaining the recommendations of a Selection Committee consisting of—
>
> (a) the Prime Minister—Chairperson;
>
> (b) the Speaker of the House of the People— Member;
>
> (c) the Leader of Opposition in the House of the People—Member;

(d) the Chief Justice of India or a Judge of the Supreme Court nominated by him—Member;

(e) one eminent jurist, as recommended by the Chairperson and Members referred to in clauses

(a) to (d) above, to be nominated by the President—Member.

(2) No appointment of a Chairperson or a Member shall be invalid merely by reason of any vacancy in the Selection Committee.

(3) The Selection Committee shall for the purposes of selecting the Chairperson and Members of the Lokpal and for preparing a panel of persons to be considered for appointment as such, constitute a Search Committee consisting of at least seven persons of standing and having special knowledge and expertise in the matters relating to anti-corruption policy, public administration, vigilance, policy making, finance including insurance and banking, law and management or in any other matter which, in the opinion of the Selection Committee, may be useful in making the selection of the Chairperson and Members of the Lokpal:

Provided that not less than fifty per cent. of the members of the Search Committee shall be from amongst the persons belonging to the Scheduled Castes, the Scheduled Tribes, Other Backward Classes, Minorities and women:

Provided further that the Selection Committee may also consider any person other than the persons recommended by the Search Committee.

(4) The Selection Committee shall regulate its own procedure in a transparent manner for selecting the Chairperson and Members of the Lokpal.

(5) The term of the Search Committee referred to in sub-section (3), the fees and allowances payable to its members and the manner of selection of panel of names shall be such as may be prescribed." We bear in mind the Report of the Goswami Committee and, what is more, the Law Commission Report (Two Hundred and Fifty-Fifth) and lay down as follows.

230. The appointment of the Chief Election Commissioner and the Election Commissioners, shall be made by the President on the advice of a Committee consisting of the Prime Minister, the 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.

231. We make it clear that this will be subject to any law to be made by Parliament.

CC. AN ELECTION COMMISSIONER ENTITLED TO SAME PROTECTION AS GIVEN TO CHIEF ELECTION COMMISSIONER?

232. One of the contentions raised by the petitioners is this Court must provide for the same protection to the Election Commissioners as is available to the Chief Election Commissioners. Even the Report of the Election Commission itself would appear to endorse the said view and complaint. We expatiate. It is the contention of the petitioners that when the Constitution was framed, the Founding Fathers contemplated that appointment of Election Commissioners was to be need based and not a full-time affair. Contrary to the said view, however, a multi-Member team, is what the Election Commission of India has become, in fact, since 1993. It is here to stay. The distinction between the Chief Election Commissioner and the Election Commissioners have been whittled down considerably by the amendments brought to the 1991 Act. However, when it comes to the constitutional protection, it is pointed out that the second proviso to Article 324(5) only enacts the protection that the Election Commissioner or Regional Commissioner shall not be removed from Office except on the recommendation of the Chief Election Commissioner. An attempt has, in fact, been made to persuade this Court to hold that, being in the nature of a further proviso, as the words of the second proviso begin as 'provided further', it is only a further protection to the Election Commissioner or a Regional Commissioner. Thus, it is pointed out, the Court must adopt the following interpretation. An Election Commissioner or Regional Commissioner can be removed only in the like manner and on like grounds as a Judge of the Supreme Court of India. A further safeguard is, however, provided to the Election Commissioner, viz., that he can be removed from Office only on the recommendation of the Chief Election Commissioner. To appreciate the argument, we recapture Article 324(5). It reads as follows:

> "324(5) 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."

233. We decode the said provision as follows:

> The conditions of service and tenure of the Election Commissioners and the Regional Commissioners was to be such as made by the Rule provided. This, however, was subject to any law made by Parliament.

Parliament has quickly on the heels of the Goswami Committee, stepped in with the 1991 Act. We have already noted the terms of the Act as subsequently amended. It contemplates salary to be paid, not only to the Election Commissioner but also to the Chief Election Commissioners, which is to be equal to the salary of the Judge of the Supreme Court of India. The term as we have already noticed, both of the Chief Election Commissioner and the Election Commissioner, was to be six years, subject to the proviso, which we have noticed. It also provides for other aspects relating to conditions of service. While unanimity of views among the members is statutorily contemplated in Section 10(1) as a desirable goal, the inevitable differences of opinion was contemplated and Section 10(3) has declared that in such an eventuality, it is the opinion of the majority of the Members, which would prevail. We have already noticed how in T.N. Seshan (supra), this has been found to not militate against the Chief Election Commissioner being given the power to act as the Chairman of the Commission. It may be true that there is equality otherwise, which exists between the Chief Election Commissioner and the Election Commissioners in various matters dealt with under the Act. However, we must bear in mind, in law, Article 324 is inoperable without the Chief Election Commissioner [See T.N. Seshan (supra)]. In law, there may not be an insuperable obstacle for Parliament to decide to do away with the post of Election Commissioner. In fact, it happened, as can be seen in the Judgment in Dhanoa (supra) wherein it was found that the termination of service of the Election Commissioners following the abolition of the posts did not constitute removal of the Election Commissioner within the meaning of the second proviso to Article 324(5). More importantly, even on a plain reading of Article 324(5), we are of the view that in regard to the prayer that the Election Commissioner must be accorded the same protection as is given to the Chief Election Commissioner, the argument appears to be untenable. This prayer was rejected, in fact, in T.N. Seshan (supra). It is clear as day light that the first proviso protects the Chief Election Commissioner alone from removal by providing for protection as is accorded to a Judge of the Supreme Court of India. It is still further more important to notice that the first proviso interdicts varying of the conditions of service of the Chief Election Commissioner to his disadvantage after the appointment. It is, thereafter, that the second proviso appears. The second proviso exclusively deals with any other Election Commissioner, inter alia. The word ‘any other Election Commissioner’ has been provided to distinguish him from the Chief Election Commissioner. Therefore, for the Election Commissioners other than the Chief Election Commissioner, the protection which is clearly envisaged, as against his removal is only that it can be effected only with the recommendation of the Chief Election Commissioner. We are of the view that in the context of the provision, the words ‘provided further’ cannot be perceived as an additional protection to the Election Commissioner. It is intended only to be a standalone provision, specifically meant to deal with the categories of persons mentioned therein. In fact, the acceptance of the argument of the petitioners would involve yet another consequence, which to our minds, would appear to project an anomalous result. To put it mildly, if the Election Commissioner is accorded the protection available under the first proviso to the Chief Election Commissioner, the

> result will be as follows. He would be entitled to not only claim immunity from removal except on being impeached like a Judge of the Supreme Court but he would be conferred with a further protection even after the impeachment or before the impeachment starts, that the Chief Election Commissioner must also recommend the removal.

We would think that no more need be said and we reject the contention. However, we only would observe that in the light of the fact that Election Commissioners have become part of the Election Commission, perhaps on the basis of the volume of work that justifies such an appointment and also the need to have a multi-Member team otherwise, it is for Parliament acting in the constituent capacity to consider whether it would be advisable to extend the protection to the Election Commissioners so as to safeguard and ensure the independence of the Election Commissioners as well. This goes also as regards variation of service conditions after appointment.

DD. REGARDING INDEPENDENT SECRETERIAT/CHARGING EXPENDITURE ON THE CONSOLIDATED FUND OF INDIA

234. One of the contentions and, therefore, relief sought is, that there must be an independent Secretariat to the Election Commission of India and the its expenditure must be charged on the Consolidated Fund of India on the lines of the Lok Sabha/Rajya Sabha Secretariat.

235. In this regard, the second respondent (the Election Commission of India) has filed a counter affidavit in Writ Petition (C) No. 1043 of 2017, in which Writ Petition, the contention and the prayer have been incorporated. In the Counter Affidavit of the Election Commission itself, the stand of the Election Commission can be stated in a nutshell as follows:

> It has sent a proposal that the expenditure of the Commission should be charged on the Consolidated Fund of India. It refers to the Election Commission Charging of Expenses on the Consolidated Fund of India Bill, 1994, which provided for the various items of expenditure to be charged upon the Consolidated Fund of India. It reiterated its proposal for an independent Secretariat as also charging of the expenditure on the Consolidated Fund of India by letter dated 13.04.2012, as also in December, 2016. It has also laid store by the recommendation of the Law Commission, which inter alia, recommended the insertion of Article 324(2A), which contemplated the Election Commission being provided with an independent and permanent secretarial staff.

236. There cannot be any doubt that the Election Commission of India is to perform the arduous and unenviable task of remaining aloof from all forms of subjugation by and interference from the Executive. One of the ways, in which, the Executive can bring an otherwise independent Body to its knees, is by starving it off or cutting off the requisite financial wherewithal and resources required for its efficient and independent functioning. It would not be unnatural if faced with the prospect of it not being supplied enough funds and facilities, a vulnerable Commission may cave in to the pressure from the Executive and, thus, it would result in an insidious but veritable conquest of an

otherwise defiant and independent Commission. This is apart from the fact that cutting off the much-needed funds and resources will detract from its efficient functioning.

237. No doubt, the stand of the Union of India would appear to be that these are all matters of policy and no interference is needed or warranted.

238. We must bear in mind that to elevate it to a constitutional provision and protection thereunder, maybe a matter, which must engage the attention of the Constituent Body. This is again a matter which can also be provided by way of a law by Parliament. We have no doubt that there is considerable merit in the complaint of the petitioner, which apparently, is endorsed by the Election Commission of India itself. We cannot be oblivious to the need for articulation of details in regard to the expenditure, which is a matter of policy, which we refrain from doing. We would only make an appeal on the basis that there is an urgent need to provide for a permanent Secretariat and also to provide that the expenditure be charged on the Consolidated Fund of India and it is for the Union of India to seriously consider bringing in the much-needed changes. EE. THE FINAL RELIEF

239. The Writ Petitions are partly allowed and they are disposed of as follows:

> I. We declare that as far as appointment to the posts of Chief Election Commissioner and the Election Commissioners are concerned, the same shall be done by the President of India on the basis of the advice tendered by a Committee consisting of the Prime Minister of India, the Leader of the Opposition in the Lok Sabha and, in case, there is no such Leader, the Leader of the largest Party in the Opposition in the Lok Sabha having the largest numerical strength, and the Chief Justice of India. This norm will continue to hold good till a law is made by the Parliament.
>
> II. As regards the relief relating to putting in place a permanent Secretariat for the Election Commission of India and charging its expenditure to the Consolidated Fund of India is concerned, the Court makes a fervent appeal that the Union of India/Parliament may consider bringing in the necessary changes so that the Election Commission of India becomes truly independent.
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> ……J. [K.M. JOSEPH] ……J. [Aniruddha Bose] ……J. [Hrishikesh Roy] .....J. [C. T. Ravikumar] NEW DELHI;
>
> DATED: MARCH 2, 2023.
>
> 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 JUDGMENT 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.

Borrowed from the title of the classic book - Granville Austin, Working a Democratic Constitution: A History of the Indian Experience, Oxford University Press. 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 https://plato.stanford.edu/entries/dewey-political/ 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 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 Others6 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 sub- serves 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 (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 https://www.ohchr.org/en/elections BR Ambedkar, "Evidence before the Southborough Committee", in Babasaheb Ambedkar: Writings and Speeches, published by Government of India, Vol. 1, pages 243-278 BR Ambedkar, "States & Minorities", in Babasaheb Ambedkar: Writings and Speeches, published by Government of India, Vol. 1., pages 381-541 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 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- Shiva Rao, page 148 ibid, page 155 Ibid, page 164 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 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 ibid, page 201 ibid, page 201 ibid, page 205 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:

> ibid, page 249-250 Statement of Sardar Patel, p. 249 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 ibid, page 250 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 ibid, page 251 ibid, page 251-52 ibid, page 288 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 Others32 (hereinafter "N.P. Ponnuswami"), a bench of six judges of this Court was dealing with the question whether the High Court under Article 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 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." (1978) 1 SCC 405

> 49. However, a subsequent decision of a two-judge bench in Jyoti Basu and Others v. Debi Ghosal and Others34 (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 Another35 (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.
>
> (1982) 1 SCC 691 (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 Another36 (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 (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 Others37 (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 (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 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 Another39 (PUCL (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.

(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 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 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 (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." 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 fail 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." Vishakha v. State of Rajasthan, AIR 1997 SC 3011 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.

(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 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 Others48:

> "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 (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 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.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 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 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 Report of Second Administrative Reform Commission (2009), Pg. 79, Available at:
>
> https://darpg.gov.in/en/arc-reports 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 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. COUNTRY Composition Composition Appointing Eligibility/ Removal Authority NO of Election of Selection Tenure method/ Body Committee measures to ensure Independence 1 PAKISTAN There shall PM in President CEC- A Judge of Under be Chief consultation the SC or has Article Election with LOP in been a Judge of a 215(2) of the Commissioner the National High Court constitution, and 4 Assembly, (qualified to be a the members forward 3 Judge of the commissioner who shall names for Supreme Court) or a member be High appointment [Art 213(2)] can only be Court of the removed Judges commissioner Members- Must from office in to a be a High Court a manner from each parliamentary Judge.

Province. pre
committee for Not more than 68
[Article 218 Art
hearing and years of age.
(2)] as

Constitution of Islamic Republic of Pakistan, available at :

https://drive.google.com/file/d/1TMpGdvhpYXMh07ZQoS_SDxwQoH_C8itF/view?usp=sharing
S. COUNTRY Composition Composition Appointing Eligibility/ Removal Authority
NO of Election of Selection Tenure method/ Body Committee measures to ensure
Independence confirmation For a term of 5 removal of of any one years [Art 215(1)]
judges i.e. if person. he has been The guilty of Parliamentary misconduct 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]			
2	Bangladesh	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)]	th El Co sh re fr of in ma on gr Ju Su Co An Co ma hi wr

Constitution 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. COUNTRY Composition Composition Appointing Eligibility/ Removal Authority NO of Election of Selection Tenure method/ Body Committee measures to ensure Independence one person, under his the chief hand election addressed to commission the er is to act President.

		as its chairman. [Art 118 (1)]			
3	Australia	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. The Commissi is headed by Chairperson, must be an a or retired j the Federal of Australia other member are the Elec Commissioner a non-judici member. eligible for appointment.
4.	Canada58	Chief Electoral Officer (S.13 of Canada Elections Act)	-	Appointed by resolution of the House of commons	10 years [S. Not eligible appointment that office.

Commonwealth Electoral Act,1918 available at: https://www.legislation.gov.au/Details/C2022C00074 Canada Election Act, available at: https://laws-lois.justice.gc.ca/eng/acts/E-2.01/page-2.html#docCont S. COUNTRY Composition Composition Appointing Eligibility/ Removal Authority NO of Election of Selection Tenure method/ Body Committee measures to ensure Independence Commons.

[S.13(1)] 5 Sri Chairman In making President To be selected The Lanka59 and Four such amongst persons procedure Members appointments who have followed in [Art. 103(1)] the President distinguished removing a shall seek the themselves in any Judge of the observations profession or in Supreme of a the field of Court or the Parliamentary administration or Court of Council education. Appeal (hereinafter One of the should be referred to as members so followed in "the appointed shall be removing a Council"), a retired officer of member comprising – the Department of from office

(a) the Prime Elections or during the Minister; Election period of the

(b) the Commission, who term of Speaker; has held office as office. [Art

(c) the Leader a Deputy 103(4)] of the Commissioner of Opposition; Elections or A member of

(d) a nominee above. The the of the Prime President shall Commission Minister, who appoint one shall be paid shall be a member as its such Member of Chairman. emoluments Parliament; as may be and The term of office determined

(e) a nominee of members of the by of the Leader Elections Parliament.

of the Opposition, who shall be a Member of Parliament.		Commission is five years. [Art. 103(6)]

Constitution of Sri Lanka-

https://drive.google.com/file/d/1W5j3D_8CUiYjox8t8eUSlg7SFifjmebK/view?usp=sharing S. COUNTRY Composition Composition Appointing Eligibility/ Removal Authority NO of Election of Selection Tenure method/ Body Committee measures to ensure Independence Fund and shall not be diminished during the term of office of the member. [Art 103(8)] 6 United The Federal The President -Each States of Election Commission and commissioner is America Commission is appointed confirmed appointed for a consists of by the by the six-year term 6 election President and Senate -Two commission confirmed by commissioners ers, and not the Senate. are appointed more than every two years.

3 members, -The Chair of may Commission represent changes every the same year.

		political party. [S.306(a)(1)]			[S.306(2)(a)]
7	Nepal61	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 Bachelor's Degree from a recognized university, b. is not a membe of any political party immediately before t appointment; c. has attained t age of forty-five and d. possesses high moral character. [Art. 245(6)] Six Years

FEDERAL ELECTION CAMPAIGN ACT OF 1971, available at:

https://www.govinfo.gov/content/pkg/COMPS-985/pdf/COMPS-985.pdf Constitution of Nepal, Available at: https://lawcommission.gov.np/en/wp-content/uploads/2021/01/Constitution-of-Nepal.pdf S. COUNTRY Composition Composition Appointing Eligibility/ Removal Authority NO of Election of Selection Tenure method/ Body Committee measures to ensure Independence the House of 245(3)] illness.

			Representatives - Member d. Chairperson of National Assembly - Member e. Leader from the Opposition Party in House of Representative- Member f. Deputy Speaker of House of Representatives- Member), appoint the Chief Election Commissioner and the Election Commissioners.		
8	South Africa62	The Commission shall consist of five members, one of whom shall be a judge, appointed	Panel shall consist of: (a) President of the constitutional court- Chair-person (b) Representative of	President on nomination by committee of national assembly proportionally consisting of	(a) is a South African citizen; (b) does not at that stage have a high

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by      the                            members
                the    human                                party-
President.                             of all the
                rights court.                               political
[S.6(1)]                               parties
                                       represented
                                                            profile;
                (c)                    in     that           (c)·has
                representative         Assembly             been
                of          the        from       a         recommended
```

Electoral Commission Act 51 of 1996, available at:

https://www.gov.za/sites/default/files/gcis_document/201409/act51of1996.pdf S. COUNTRY Composition Composition Appointing Eligibility/ Removal Authority NO of Election of Selection Tenure method/ Body Committee measures to ensure Independence commission list of by the of recommendation on gender candidates National the Electoral recommended equality Assembly Court, and by the by a -the panel.

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            (d)     public             resolution          adoptio
            prosecutor                 adopted             a major
            established.               by     a            the mem
            [Section 6(3)]             majority            of
                                       of   the            Assembl
                                       members
                                                           a resol
                                       of     that
                                                           calling
                                       Assembly
                                                           that
                                       ;    and            commiss
                                        (d) has            removal
                                       been                office
                                       nominated
                                                           [S.7(3)
                                       by         a
                                       committee
                                       of   the
                                       National
                                       Assembly,
                                       proportionally
                                       composed
                                       of
                                       members
                                       of     all
                                       parties
                                       represented
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					in that Assembly , from a list of recommended candidates submitted to the committee by the panel referred to in sub-section [S.6(2)]	
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
	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	the motion, the King appoints the commissioners by Royal Warrant	

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.

VIII. Process of Selection of other Constitutional/Statutory Bodies
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:

Composition Composition Appointing Eligibility S. Authorities Tenure Conditions No. of Body of Authority ensuring Selection Independence Committee

1. National NHRC The President Chairman 3 years The Human composed Selection - retired or until President Rights of Committee (Section- Judge of the age can remove Commission Chairperson includes: 4) the of 70 the and 12 Supreme years chairman (The other ❑Prime Court or any Protection of members Minister (Section member Human . (Chairman) Member 6. Term from the Rights Act, , 1- One of office office 1993) (5 full ❑Speaker who has of time under of Lok been Chairperson some members Sabha, judge of and circumstances and 7 Members) ❑Union the SC deemed Home members) Minister, Member ❑Deputy 2- One (Section Chairman who has 3-

Constitution of NHRC) of Rajya Sabha, ❑Leaders been CJ of the HC

The Protection of Opposition 3 - Members out of

			in both Houses of the Parliament		which at least on shall be a woman among candidate with the knowledge or practical experience	
S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Ten
					in the matter of Human Rights.	
2.	State Human Rights Commission (The Protection of Human Rights Act, 1993)	Chairperson and 2 members (Section 22 Appointment of son and Members of State Commission)	Appointed by the Governor on the recommendation of Committee consisting: • CM • Speaker of 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	3 y or yea whi is ear (Se Ter off Cha and Mem

		The Protection of Human Rights Act, 1993	• State Home Minister, • Leader of the Opposition in the Legislative Assembly	Court in the state	of Sta Com Eli for app
3.	CBI (headed by Director) (Delhi Special Police Establishment Act, 1946)	(Section 4A Committee for appointment of Director) Delhi Special Police Establishment Act, 1946	Central Government shall appoint Director of the CBI on the recommendation of the 3-member committee consisting of: • The Prime Minister as the Chairperson • Leader of Opposition in the Lok Sabha, and	By Appointment Committee	-	2 y ten (Se 4B Ter and con of ser of Dir) Del Spe Pol Est Act 194

S. No.	Authorities	Composition of Body	Composition of Selection	Appointing Authority	Eligibility

			Committee		
			▪ CJI or Judge of the SC, nominated by him.		
4.	Chief Information Commissioner (The Right to Information Act, 2005)	- Chief Information Commissioner - Central Information Commissioners (as deemed fit, maximum 10) (Section 12 Constitution of Central Information Commission) Right to Information	▪Prime Minister (Chairman) ▪Leader of Opposition in the Lok Sabha ▪ Union Cabinet Minister (nominated by the PM)	President on the recommendation of the committee	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.	
		Act, 2005				
					Shall not be a member of parliament or legislature of any state or UT and should not hold any officer of profit under state.	
S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	T
5.	Central Vigilance Commission	- Central Vigilance Commissioner - Vigilance	Prime Minister (Chairman)	President on the recommendation of the committee	For CVC - Persons who are or have	4 f t d e

	Commissioners (not more than 2) (Section 3 Constitution of Central Vigilance Commission) Central Vigilance Commission Act, 2003	• Leader of Opposition in the Lok Sabha • Minister of Home Affairs	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	o c o s o C V C C V C
S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Te Ac
6.	Lokpal (Lokpal and Lokayukta Act, 2013)	Chairperson - other members (as deemed fit, not more than 50% shall be judicial members) (Section 4 Appointment	• Prime Minister (Chairman) • Leader of Opposition in the Lok Sabha • Speaker of House of the People	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	5 fr en of 70 ye wh is ea S. Sh be in fo -r ap

of Chairperson and Members on recommendations of the Selection Committee)	• CJI/Judge of SC • One eminent Jurist	as Ch or Me of Lo - ap re to ma by Pr . - of pr un th go - co el wi a pe of ye fr re

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,

Lokpal and Lokayuktas Act, 2013

S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Ten
					law and management . Chairpersons and members shall not be: - 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.	the pos : M can app as Cha an, pro agg ter doe not exc 5 y (Se 6 T of of Cha and Mem Lok and Lok Act 201
7.	Press	-	Chairman	Different	No	3 y

	Council of India (Press Council of India Act, 1978)	Chairman - 28 other members (Section 5 Composition of the Council)	• Speaker of the House of	set of members are appointed according to the requirement of their roles. For chairman,	working journalist who owns, or carries on the business of management of, any newspaper	(Ch & o Mem PRO – Cha to con to

S. No.	Authorities	Composition of Body	Composition of Selection Committee	Appointing Authority	Eligibility	Tenure
		Press Council Act, 1978	the People (Lok Sabha)	a committee is formed.	shall eligible for nomination (Proviso to Sec 5(3))	office until the Council is reconstituted in accordance with Section 5 or for a period of 6 months, whichever is earlier Retiring member eligible for only one
			• A person elected by the members of the Council			

term.
(Section

Term of
office
and
retirement
of
members)

Press
Council
Act,

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 Others67 for issuance and early scrutiny of social status certificates (showing that a person belongs to SC/ST community) for admission in 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) https://www.hindustantimes.com/opinion/ambedkars-constitutionalism-speaks-to-contemporary-t

101637851829964.html AIR 1984 SC 469 (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 (1998) 1 SCC 226 AIR 1997 SC 3011 (2001) 6 SCC 577 (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 aforenoted 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 Others73 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 (2014) 4 SCC 427 (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:

> (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 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 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