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# Supreme Court verdict on ECI appointments

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**Why in News:** A five-judge bench of the Supreme Court unanimously ruled that a high-power committee consisting of the Prime Minister, Leader of Opposition in Lok Sabha, and the Chief Justice of India must pick the Chief Election Commissioner (CEC) and Election Commissioners (ECs).

## Current Appointment of CEC and ECs

There are just five Articles (324-329) in Part XV (Elections) of the Constitution.

Article 324 of the Constitution vests the “superintendence, direction and control of elections” in an Election Commission consisting “of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix”.

The Constitution does not lay down a specific legislative process for the appointment of the CEC and ECs. The President makes the appointment on the advice of the Union Council of Ministers headed by the Prime Minister.

## Election commission as three member bod

For almost four decades of the republic, until 1989, the Election Commission was a single-member body, with only a Chief Election Commissioner (CEC).

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On December 12, 1990, T N Seshan was appointed CEC. Seshan was fiercely independent, and as he went about the Commission’s job with messianic zeal, the Congress government headed by P V Narasimha Rao decided to expand the poll body again on October 1, 1993.

M S Gill and G V G Krishnamurthy were appointed as ECs. Also, the government brought an Ordinance to amend the EC Act, and made the CEC and the ECs equal by giving all three the status of a Supreme Court judge, retiring at the age of 65 years.

All three Commissioners now had equal decision-making powers. The amendment also introduced sections that envisaged that the CEC and the ECs would act unanimously and, in case there was a difference of opinion on any issue, the majority view would prevail.

## Powers of the Election Commission

The Constitution of India gave the Election Commission sweeping powers without going into the specifics.

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Introducing this provision in the Constituent Assembly on June 15, 1949, Babasaheb Ambedkar had said “the whole election machinery should be in the hands of a Central Election Commission, which alone would be entitled to issue directives to returning officers, polling officers and others”.

Parliament subsequently enacted The Representation of the People Act, 1950, and The Representation of the People Act, 1951, to define and enlarge the powers of the Commission.

The Supreme Court in ‘Mohinder Singh Gill & Anr vs The Chief Election Commissioner, New Delhi and Ors’ (1977) held that Article 324 “operates in areas left unoccupied by legislation and the words ‘superintendence, direction and control’ as well as ‘conduct of all elections’ are the broadest terms”. The Constitution has not defined these terms.

The SC said Article 324 “is a plenary provision vesting the whole responsibility for national and State elections” in the ECI “and, therefore, the necessary powers to discharge that function”.

The Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991 (EC Act) requires that the EC and CEC must hold the post for a period of six years. This law essentially governs the conditions of service of the CEC and ECs.

## **Overview of the Case**

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

The crux of the challenge is that since there is no law made by Parliament on this issue, the Court must step in to fill the “constitutional vacuum.” This examination also leads to the larger question of separation of powers and if the judiciary is overstepping its role in filling this gap in the law.

Two corollary issues that were also examined by the Court are whether the process of removal of the two Election Commissioners must be the same as the CEC

In 2015, a public interest litigation was filed by Anoop Baranwal challenging the constitutional validity of the practice of the Centre appointing members of the Election Commission.

In October 2018, a two-judge bench of the SC referred the case to a larger bench since it would require a close examination of Article 324 of the Constitution, which deals with the mandate of the Chief Election Commissioner.

The SC had not debated this issue earlier. In September last year, a five-judge Constitution bench headed by Justice KM Joseph began hearing the case and almost a month later

## **Highlight of the verdict**

The Court’s verdict is based on a reading of the debates of the Constituent Assembly to ascertain what the founding members of the Constitution envisaged the process to be and an interpretation of similar provisions in the Constitution

The verdict states that a “golden thread runs through” the proceedings of the Constituent Assembly debates on the provision. “All the Members were of the clear view that elections must be conducted by an independent Commission. It was a radical departure from the regime prevailing under the Government of India Act, 1935

The deliberate addition of the words “subject to the provisions of any law made in that behalf by Parliament” after prolonged discussions

The ruling examined a number of provisions in the Constitution, including the ones relating to the powers of the Supreme Court and High Court; establishing the SC, ST and Backward Classes Commissions, etc. where the Constitution uses the phrase “subject to the provisions of any law made by Parliament”.

The Court finds that while a legislation has been supplemented for those provisions, there is no law on appointment of the CEC even 70 years after independence.

On the issue of whether the process of removal of Election Commissioners must be the same as it is for the CEC, the Court ruled that it cannot be the same.

The Constitution states that the CEC can be removed in a process similar to a judge through a majority in both houses of Parliament on grounds of proven incapacity or misbehaviour

On the issue of funding the EC, the Court left it to the government “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,” the ruling stated.