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Appointment of CEC and Members to EC

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Why is in news? Why did the SC refuse to stay the appointments of two election commissioners?

The Supreme Court on March 21 dismissed applications challenging the appointment of retired IAS officers Gyanesh Kumar and Sukhbir Singh Sandhu as election commissioners (ECs). It also declined to stay the **Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023**, under which the appointments were made.

The Bench of Justices Sanjiv Khanna and Dipankar Datta said staying the appointments at this juncture, with the elections set to take place shortly, would cause chaos and uncertainty.

The NGO Association for Democratic Reforms had pleaded for the appointments to be stayed, as part of the ongoing challenge against the EC Act.

About:

Article 324 of the Constitution states that the Election Commission will comprise the Chief Election Commissioner (CEC) and such number of Election Commissioners (ECs), as the President may decide

The Election Commission of India (ECI) is responsible for managing the preparation of electoral rolls and conducting elections to Parliament, State Legislatures, and the offices of the President and Vice-President.

The **Constitution specifies that the President** will appoint the CEC and ECs, subject to the provisions of an Act of Parliament

In the Constituent Assembly debates, the executive's role in appointing the CEC and ECs was discussed as the President acts on the aid and advice of the Prime Minister.

Dr. B.R. Ambedkar pointed out that the election machinery should be out of the control of the government. Members of the Constituent Assembly agreed to **leave the appointment mechanism of the ECI to the discretion of Parliament**.

In 1991, Parliament passed the **Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act**. The Act set the salary of the CEC and ECs at the **same level as a Supreme Court judge**. It did not provide for their appointment process, which continued to be decided by the President.

In **March 2023**, while examining the appointment of the CEC and ECs, the Supreme Court declared that their **appointment should not be done solely by the Executive**

The Court noted that the **ECI should be independent of Executive control**. It **mandated a selection process**, which would hold until Parliament makes a law. The Court directed that the appointment should be done by the President on the **recommendation of a Selection Committee**

The **Selection Committee** will consist of: (i) the Prime Minister, (ii) the Leader of Opposition in Lok Sabha, and (iii) the Chief Justice of India

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The **Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023**, was introduced in Rajya Sabha on August 10, 2023 and passed.

It **repeals the 1991 Act** and provides for the appointment process and conditions of services for the CEC and ECs.

Key Features of the act, 2023:

Election Commission: The Election Commission will consist of a Chief Election Commissioner (CEC) and other Election Commissioners (ECs). The President will periodically fix the number of ECs.

Appointment of the Commission: The Commission will be appointed by the President, upon the recommendation of the Selection Committee. The **Selection Committee** will comprise the **Prime Minister, Cabinet Minister, and Leader of Opposition in Lok Sabha** (or leader of the single largest opposition party). A **Search Committee** headed by the Cabinet Secretary will suggest five names to the Selection Committee. The Selection Committee may consider any person other than those suggested by the Search Committee.

Eligibility criteria: The CEC and ECs must: (i) be persons of integrity, (ii) have knowledge and experience in the management and conduct of elections, and (iii) be or have been Secretary (or equivalent) to the government.

Term and reappointment: Members of the Election Commission will **hold office for six years, or until they attain the age of 65 years**, whichever is earlier. Members of the Commission **cannot be re-appointed**. If an EC is appointed as a CEC, the overall period of the term may not be more than six years.

Salary and pension: The salary, allowances, and other conditions of service of the CEC and ECs will be equivalent to that of the Cabinet Secretary. They will have an option to draw pension and other retirement benefits from the service that they belonged to previously.

Removal: The Bill retains the manner of removal of CEC and ECs as **specified in the Constitution**. The CEC may be removed in the **same manner and on the same grounds as a Supreme Court Judge**. ECs may be **removed only upon the recommendation of the CEC**.

Key Issues and Analysis:

The selection process of the Election Commission may be **dominated by the government**, which has implications for its independence.

Accepting the Selection Committee's recommendations in spite of a vacancy in its constitution may effectively lead to a **monopoly of government members** in selecting candidates.

Making the CEC and EC's **salary equivalent to the Cabinet Secretary** may **lead to government influence** as it is fixed by the government. This is unlike the salary of a Supreme Court judge which is fixed through an Act of Parliament.

CECs and ECs also perform **quasi-judicial functions**. **Limiting these posts to senior bureaucrats** may exclude other suitable candidates.

Suggestions made by various Commissions/Courts for composition of the Selection Committee:

Goswami Committee (1990): **For CEC:** Appointed by the President in consultation with the Chief Justice + Leader of Opposition of Lok Sabha (or leader of the largest party in Lok Sabha). **For EC:** Appointed by the President in consultation with the Chief Justice + Leader of Opposition of Lok Sabha (or leader of the largest party in Lok Sabha) + CEC.

The Constitution (Seventieth Amendment) Bill 1990: Chairman of Rajya Sabha + Speaker of Lok Sabha + Leader of the Opposition (or the leader of the largest party) in Lok Sabha. The CEC was further made a part of the consultative process in the appointment of the Election Commissioners.

National Commission to Review the Working of the Constitution Report (2002): Prime Minister + Leader of the Opposition in Lok Sabha + the Leader of the Opposition in Rajya Sabha + the Speaker of Lok Sabha + the Deputy Chairman of Rajya Sabha.

Law Commission (2015): Prime Minister + the Leader of Opposition of Lok Sabha (or the leader of the largest opposition party in Lok Sabha) + the Chief Justice.

Supreme Court (2023): Prime Minister + Leader of Opposition in Lok Sabha (or leader of single largest opposition party in Lok Sabha) + Chief Justice.

The Goswami Committee and the ECI have **recommended an independent secretariat** for the ECI along the lines of Lok Sabha, Rajya Sabha, the Supreme Court, and High Courts. The Supreme Court (2023) also noted the importance of having an independent secretariat for the functioning of the ECI.

What prompted the change?

Four petitions were filed before the apex court in 2015, 2017, 2021, and 2022, which broadly **called for a fair and transparent system to choose Election Commissioners**.

On October 23, 2018, while considering the 2015 petition, a two-judge bench felt that the matter required interpretation of Article 324 of the Constitution, which deals with the role of the Election Commission of India. This issue hadn't been discussed before in the Supreme Court, and so it was referred to a Constitution bench.

In September 2022, a five-judge Constitution bench led by Justice KM Joseph started hearing the petitions.

The petitioners pointed out that **Article 324(2)** specifies the President's role in appointing Election Commissioners, with the caveat that this appointment is subject to any law passed by Parliament. However, successive governments had not shown any inclination to enact such a law.

They criticised the current appointment system for being opaque and said it raises doubts about the institution's independence. They called for a consultative process in which a collegium or a body of persons is tasked with the responsibility to select the Election Commissioners.

Mechanism for Appointment of the CEC and ECs before this act:

The power to make appointments **rested exclusively with the Executive** (the Union government).

Part XV (Elections) of the Constitution outlines Articles 324-329, governing electoral processes.

The Constitution does not prescribe a specific legislative procedure for appointing the CEC and ECs.

Article 324 vests the responsibility of overseeing elections in an Election Commission comprising the CEC and other ECs, as determined by the President.

In March 2023, in the **case of Anoop Baranwal v Union of India**, a five-judge Constitution Bench modified the process of appointing members of the Election Commission of India (ECI), to ensure its independence.

Prior to this judgement, the Chief Election Commissioner (CEC) and the Election Commission (ECs) were appointed **directly by the President** on the advice of the Prime Minister.

A committee comprising the **Prime Minister, the Leader of the Opposition in the Lok Sabha, and the Chief Justice of India** to make the appointments.

Law Minister proposes suitable candidates to the Prime Minister, who advises the President on the appointments.

Removal: Commissioners have the liberty to resign or be removed before completing their term. The removal process for the CEC mirrors that of a Supreme Court judge, necessitating parliamentary action. Removal of any other EC can only occur upon the CEC's recommendation.

Way forward:

Safeguarding Independence: Upholding the integrity and independence of the Election Commission remains paramount, necessitating robust oversight mechanisms.

Addressing Concerns: Mitigating concerns surrounding transparency, executive influence, and eligibility criteria is essential to foster public trust and confidence.

Continued Judicial Vigilance: Ongoing judicial oversight is crucial to ensure the effective implementation of electoral reforms and uphold democratic principles.

Conclusion:

The transition towards a consultative process for appointing Election Commissioners reflects a significant milestone in India's electoral governance.

While the reform bill marks a commendable step towards enhancing transparency and inclusivity, addressing current challenges and safeguarding institutional independence will be pivotal in fostering public trust and strengthening democratic institutions.