

SYNOPSIS

The instant Writ Petition has been filed in public interest under Article 32 of the Constitution of India challenging the constitutional validity of the practice of the Respondent in appointing the members to the Election Commission as being violative of Articles 14, 324 (2) and basic features of the Constitution.

Article 324(2) of the Constitution of India states:

"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."

Presently, the appointment of Chief Election Commissioner and Election Commissioner is done solely by the executive. The impugned practice is incompatible with Article 324(2) and is manifestly arbitrary because:

A. Article 324(2) mandates Parliament to make a just, fair, and reasonable law. It is pertinent to mention that Dr. B.R. Ambedkar introduced an amendment that the appointment of the Chief Election Commissioner and the Election Commissioner shall be made by the President *"subject to any law made in that behalf by Parliament."* with the hope that in due course of time the Government will take an initiative to make just, fair, just and reasonable law for the appointment of the members of Election Commission so as to ensure its independence and integrity.

B. Democracy is a facet of the basic structure of the Constitution and in order to ensure free and fair elections and to maintain healthy democracy in our country, the Election Commission should be insulated from political and/or executive interference. There is no doubt that 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. However, the appointment of members of the Election Commission on the whims and fancies of the executive violates the very foundation on which it was created, thus, making the Commission a branch of the executive.

C. Further, the Election Commission is not only responsible for conducting free and fair elections but it also renders a quasi judicial function between the various political parties including the ruling government and other parties. In such circumstances the executive cannot be the sole participant in the appointment of members of the Election Commission as it gives unfettered discretion to the ruling party to choose someone whose loyalty to it is ensured and thereby renders the selection process vulnerable to manipulation. Thus, the aforesaid practice violates Article 14 of the Constitution of India and is incompatible with free and fair elections.

By way of the present Writ Petition, the Petitioner also seeks writ of mandamus or an appropriate writ, order or direction for constituting a

neutral and independent collegium/selection committee to recommend the names for appointment on the vacant post of the members of the Election Commission on the lines of the recommendations of Law Commission in its 255th Report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; Dr. Dinesh Goswami Committee in its Report of May 1990; and Justice Tarkunde Committee in its Report of 1975. Pertinently, all the Committees and Commissions have recommended in similar lines for independent/neutral committees in order to strengthen the autonomy of Election Commission and to ensure their impartiality. However, the recommendations of the Committees and Commissions have not been implemented yet.

Pertinently, in ***Prakash Singh v. Union of India, (2006) 8 SCC 1***, in absence of legislation and failure of state to implement the recommendations of various committees and commissions for the purpose of insulating the Police from executive/ political interference, among others, this Hon'ble Court was pleased to hold, *inter alia*, as follows:

"26. Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of the rule of law; (iii) pendency of even this petition for the last over ten years; (iv) the fact that various commissions and committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the

stage has come for issuing of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the State Governments pass the requisite legislations. It may further be noted that the quality of the criminal justice system in the country, to a large extent, depends upon the working of the police force. Thus, having regard to the larger public interest, it is absolutely necessary to issue the requisite directions...

29. The preparation of a model Police Act by the Central Government and enactment of new Police Acts by the State Governments providing therein for the composition of the State Security Commission are things we can only hope for the present. Similarly, we can only express our hope that all State Governments would rise to the occasion and enact a new Police Act wholly insulating the police from any pressure whatsoever thereby placing in position an important measure for securing the rights of the citizens under the Constitution for the rule of law, treating everyone equal and being partisan to none, which will also help in securing an efficient and better criminal justice delivery system. 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 Government"

30. 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 any cause or matter. All authorities are mandated by Article

144 to act in aid of the orders passed by this Court. The decision in VineetNarain case [(1998) 1 SCC 226 : 1998 SCC (Cri) 307] notes various decisions of this Court where guidelines and directions to be observed were issued in the absence of legislation and implemented till the legislatures pass appropriate legislations. [emphasis supplied]

The inaction of the Respondent in not making appropriate law for ensuring just, fair and reasonable selection process for the appointment of members of Election Commission since 1950 is unwarranted and thus, to ensure proper implementation of the rule of law, it is in the interest of justice to issue necessary directions/ guidelines to fill the vacuum occurred on account of the aforesaid inaction till such time the legislature steps in to cover the gap or the executive discharges its role.

Hence, the Writ Petition.

List of dates

15.06.1949	<p>Article 324 was introduced as article 289 by Dr. B. R. Ambedkar before the Constituent assembly. Originally Article 324(2) read as follows:</p> <p><i>"(2) <u>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.</u>"</i></p> <p>However, there were various reservations about the</p>
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proposed Article as it gave unfettered power to the executive to appoint anyone to be a member of the Election Commission. The most prominent reservation was proposed by the eminent Constitution maker namely Prof. Shibban Lal Saksena, in the Constituent Assembly Debate, who, while proposing an amendment that the appointment of the Chief Election Commissioner should be "*subject to confirmation by a two-thirds majority in a joint session of both Houses of Parliament*", argued that appointment by the President would really mean appointment by the Government under the decision of the Prime Minister.

Agreeing with Prof. Saksena, Dr. B.R. Ambedkar, the Chairman of Drafting Committee, in his reply stated:

"With regard to the question of appointment, I must confess that there is a great deal of force in what my friend, Prof. Saksena, has stated that there is no use of making the tenure of the Election Commissioner a fixed and secure one if there is no provision in the Constitution to prevent either a fool or 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 Chief Election Commissioner or the other Election Commissioners."

Thereafter he introduced an amendment which was subsequently approved by the assembly. The said

	<p>amendment was introduced with the hope that in due course of time the Government will take an initiative to make fair, just and reasonable law for the appointment of the members of Election Commission to ensure its independence and integrity. The law as it stands today is:</p> <p><i>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, <u>subject to the provisions of any law made in that behalf by Parliament, be made by the President.</u></i></p>
1975	<p>Justice Tarkunde Committee (appointed by 'Citizens for Democracy' on the suggestion of Sri Jayaprakash Narayan) recommended that the members of Election Commission should be appointed by the President on the advice of a Committee consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha and the Chief Justice of India.</p>
May, 1990	<p>The Committee on Electoral Reforms under the chairmanship of the then Law Minister namely, Mr. Dinesh Goswami, appointed by the Central Government, made several recommendations on the issue of electoral reforms. In para no. 1.2 of its report, Mr. The Dinesh</p>

	<p>Goswami Committee recommended for the effective consultation with neutral authorities like Chief Justice of India and the Leader of the Opposition for the appointment in Election Commission.</p>
January, 2007	<p>The Second Administrative Reforms Commission, in its fourth report made in January, 2007, also recommended for the constitution of a neutral and independent collegium headed by the Prime Minister with the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Law Minister and the Deputy Chairman of the Rajya Sabha as its members for making recommendations for consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners.</p>
January 13.01.2015	<p>A Writ Petition titled as <i>Anoop Baranwal v. Union of India (Writ Petition (C) No. 104 of 2015)</i> was filed before this Hon'ble Court praying for a writ of mandamus or an appropriate writ, order or direction, commanding the Respondent to make a 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 of the Election Commission under Article 324(2) of the Constitution of India, etc.</p>

12.03.2015	The Law Commission of India made in its Report no. 255 made recommendation that the appointment of all the Election Commissioner 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 and the Chief Justice of India.
13.07.2015	This Hon'ble Court was pleased to issue notice in the aforesaid Petition.
23.10.2018	<p>This Hon'ble Court was pleased to refer the matter to the constitution bench. The relevant extract of the order is as follows:</p> <p><i>"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</i></p>

	<i>for an authoritative pronouncement.”</i>
27.02.2020-17.03.2020	The Writ Petition was listed before the Constitution bench on 27.02.2020, 03.03.2020, 04.03.2020,05.03.2020 and 17.03.2020. However, the same did not reach for hearing.
March, 2021	<p>The Citizens’ Commission on Elections (CCE) chaired by the retired Supreme Court Judge, Justice Madan B. Lokur, in its second Report titled <i>“An Inquiry into India’s Election System”</i> of March, 2021, examined the critical aspects of Parliamentary elections of 2019. The Commission highlighted several instances of inaction or omission on the part of the Election Commission which has raised doubts regarding its fairness and neutrality. The Report with respect to Electoral Process and Model Code of Conduct has said:</p> <ul style="list-style-type: none"> ● <i>“For Parliament Election-2019, ECI deliberately delayed the announcement to enable the PM to complete the inauguration blitz of a slew of projects (157 of them) that he had scheduled between February 8 and March 9.</i> ● <i>It was the longest election in the country’s history, and its scheduling gave room for suspicion that it had openly and unabashedly favoured the ruling party.</i> ● <i>Some of the major controversies of MCC pertain to (a) Lack of consistency by the ECI in enforcing the MCC, (b)</i>

	<p><i>ECI treating the ruling party with kid gloves, (c) ECI not using its powers under Article 324 of the Constitution.</i></p> <ul style="list-style-type: none"> ● <i>The Election Commissioner who dissented and stood his ground was eased out from the ECI.</i> ● <i>This is a very critical issue because the major raison d'être of the MCC was to provide a level-playing field to all contesting political parties. Dealing with the ruling party with kid gloves negates the very reason for the existence of MCC.</i> ● <i>One of the most disturbing phenomena in this election was the abuse/ misuse of Armed Forces for election purposes by the party in power. Propaganda went to the extent of calling Indian Army 'Modi's Sena' causing anger among Veterans. This forced a large number of veterans to write to the President of India that received no response."</i>
27 March- 29 April 2021	<p>That a similar pattern of inaction and abdication of the functions and duties of the Election Commission was seen in the recent round of assembly elections in various states(State of Tamil Naidu, Assam, Kerala and Union Territory of Pondicherry), especially in the State of West Bengal. The Caravan in its article titled as "<i>The Biased Referee</i>" has highlighted several instances from announcing eight-phase polling schedule for West Bengal's</p>

	<p>294 assembly seats to amending the rule regarding booth's agent in order to show Election Commission's blatant biasness in favour of the ruling government at Centre.</p>
16.5.2021	<p>The recent incidents and examples have shown the partisan behavior of the Election Commission in favor of the appointing authority or ruling party. It is to further substantiate that it is in the interest of justice to issue the necessary directions/ guidelines to constitute independent neutral and independent collegium/ selection committee for appointment of members of Election Commission on the lines of the 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. Therefore, the Writ Petition.</p>

IN THE SUPREME COURT OF INDIA
(CIVIL ORIGINAL WRIT JURISDICTION)
WRIT PETITION (CIVIL) NO. ____/2021

(PUBLIC INTEREST PETITION)

(UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA)

IN THE MATTER OF:

ASSOCIATION FOR DEMOCRATIC REFORMS

....PETITIONER

VERSUS

1. UNION OF INDIA
THROUGH ITS SECRETARY,
MINISTRY OF LAW AND JUSTICE,
SHASTRI BHAWAN, NEW DELHI-11000

2. ELECTION COMMISSION OF INDIA
THROUGH, THE CHIEF ELECTION COMMISSIONER
NIRVACHAN SADAN, SANSAD MARG AREA,
NEW DELHI- 110001

.....RESPONDENTS

WRIT PETITION IN PUBLIC INTEREST UNDER ARTICLE 32 OF THE CONSTITUTION OF INDIA FOR ISSUANCE OF WRIT, ORDER, DIRECTION OR ANY OTHER APPROPRIATE 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 AND A FURTHER DIRECTION TO THE RESPONDENTS TO APPOINT THE ELECTION

COMMISSIONER ON THE VACANT POST THROUGH COLLEGIUM/SELECTION COMMITTEE AS RECOMMENDED BY THE 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.

TO,

THE HON'BLE CHIEF JUSTICE OF INDIA AND HIS COMPANION JUDGES OF THE HON'BLE SUPREME COURT OF INDIA

THE HUMBLE PETITION OF THE
PETITIONER ABOVE-NAMED

MOST RESPECTFULLY SHOWETH:

1. The instant Writ Petition has been filed in public interest under Article 32 of the Constitution of India challenging the constitutional validity of the practice of the Respondent in appointing the members of the Election Commission as being violative of Articles 14, 324(2) and basic features of the Constitution. The Petitioner by way of present Petition is also seeking a direction for constituting a neutral and independent collegium/ selection committee for appointment of members of Election Commission on the lines of the recommendations of Law Commission in its 255th Report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; Dr. Dinesh Goswami Committee in its Report of May 1990; and Justice Tarkunde Committee in its Report of 1975.

1A. ABOUT THE PETITIONER:

Petitioner Association for Democratic Reforms (ADR), a registered Society under the Societies Registration Act XXI of 1860, has been in the vanguard of electoral and political reforms in the country. Its activities comprise advocacy for transparent functioning of political parties, conducting a detailed analysis of candidates in every election, and researching the financial records of political parties. In 1999, ADR filed a PIL in the Delhi High Court seeking disclosure of criminal, financial and educational background of candidates contesting elections. Based on this, the Supreme Court in 2002 and subsequently in 2003 made it mandatory for the candidates to disclose their criminal, financial and educational background prior to the polls by filing an affidavit with the Election Commission. ADR, along with National Election Watch, has conducted election watches for the 2009 Lok Sabha Elections, Rajya Sabha Elections and almost all the State Assembly elections since 2002. ADR is striving to bring about transparency and accountability in the functioning of political parties. In April, 2008, ADR obtained a landmark order from the Central Information Commission holding that the Income Tax Returns of political parties and the assessment orders passed on them will be available to the citizens. ADR is now working to extend this dispensation to members of Parliament and to bring political parties under the ambit of the RTI Act. Under the practice followed by ADR, the Founder-Trustee Prof. Jagdeep S Chhokar is authorised to institute proceedings on behalf of Petitioner. The Registration Certificate of Petitioner and authority letter are being filed along with

the vakalatnama. The petitioner organization's annual income is Rs.

The Petitioner has no personal interest, or private/oblique motive in filing the instant Petition. There is no civil, criminal, revenue or any litigation involving the Petitioner, which has or could have a legal nexus with the issues involved in the PIL.

The Petitioner has not made any representation to the Respondent in this regard because of the urgency in the matter in issue.

That the instant Writ Petition is based on the information/documents which are in public domain.

Facts of the case

2. Article 324 was introduced as Article 289 by Dr. B. R. Ambedkar before the Constituent assembly. Originally Article 324(2) read 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."

However, there were various reservations about the proposed Article as it gave unfettered power to the executive to appoint anyone to be a member of the Election Commission. The most prominent reservation was proposed by the eminent Constitution maker namely Prof. Shibban Lal Saksena, in the Constituent Assembly Debate, who, while proposing an amendment that the appointment of the Chief Election Commissioner should be "*subject to confirmation by a two-thirds majority in a joint session of both Houses of Parliament*", argued that appointment by the President would really mean appointment by the Government under the decision of the Prime Minister.

Agreeing with Prof. Saksena, Dr. B.R. Ambedkar, the Chairman of Drafting Committee, in his reply stated:

"With regard to the question of appointment, I must confess that there is a great deal of force in what my friend, Prof. Saksena, has stated that there is no use of making the tenure of the Election Commissioner a fixed and secure one if there is no provision in the Constitution to prevent either a fool or 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 Chief Election Commissioner or the other Election Commissioners."

Thereafter, he introduced an amendment which was subsequently approved by the Assembly. The said amendment was introduced with the hope that in due course of time the Government will take an initiative to make a fair, just and reasonable law for the appointment of the members of Election Commission to ensure its independence and integrity. The law as it stands today is:

"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."

3. That in the year 1975 Justice Tarkunde Committee (appointed by 'Citizens for Democracy' on the suggestion of Sri Jayaprakash Narayan) recommended that the members of Election Commission should be appointed by the President on the advice of a Committee consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha and the Chief Justice of India.
4. That the Committee on Electoral Reforms under the chairmanship of then Law Minister, Mr. Dinesh Goswami, appointed by the Central Government, made several recommendations on the issue of electoral reforms. In Para no. 1.2 of its Report, Mr. Dinesh Goswami Committee recommended for the effective consultation with neutral

authorities like Chief Justice of India and the Leader of the Opposition for the appointment in Election Commission. The relevant recommendations in para no. 1.2 of the Report are as follows:

(i)The appointment of the Chief Election Commissioner should be made by the President in consultation with the Chief Justice of 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).

(ii)The consultation process should have a statutory backing.

(iii)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.

A true copy of the Chapter I and Chapter II of the report of May, 1990 of the Committee on Electoral Reforms is annexed herewith and marked as **ANNEXURE P-1 (Page No. 29 to 43)**.

5. That the Second Administrative Reforms Commission, in its fourth report made in January, 2007, also recommended the constitution of a neutral and independent body to recommend the name for Election Commission. The recommendation of the Commission is as follows:

"2.1.5.4 Recommendation:

a.A collegium headed by the Prime Minister with the Speaker of the Lok Sabha, the Leader of Opposition in the Lok Sabha, the Law Minister and the Deputy Chairman of the Rajya Sabha as members should make recommendations for the consideration of the President for appointment of the Chief Election Commissioner and the Election Commissioners."

A true copy of the relevant Para no. 2.1.5 of the 4th Report of January, 2007 of the Second Administrative Reforms Commission is annexed herewith and marked as **ANNEXURE P-2 (Page No. 44 to 46)**.

6. That 12.03.2015, the Law Commission of India in its report no. 255 on the Electoral Reform recommended that the appointment of all the Election Commissioner 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 and the Chief Justice of India. A true copy of the relevant part of report no. 255 dated 12 March, 2015 of the Law Commission of India is annexed herewith and marked as **Annexure P- 3 (Page No. 47 to 57)**.

7. That on 13.07.2015, this Hon'ble Court was pleased to issue notice in a Writ Petition tiled as *AnoopBaranwal v. Union of India (Writ*

Petition (C) No. 104 of 2015), wherein the Petitioner had challenged the appointment of members of Election Commission as being violative of Article 324(2) and also sought direction of this Hon'ble Court to 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 of the Election Commission under Article 324(2) of the Constitution of India, etc.

8. The aforesaid Writ Petition was last listed before this Hon'ble Court on 23.10.2018, wherein this Hon'ble Court while referring the issue to a constitution bench passed the following order:

"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."

A copy of the order dated 23.10.2018 passed in Writ Petition(Civil) No. 104 of 2015 is marked and annexed as **ANNEXURE P-4 (Page No. 58 to 59)**.

9. The Writ Petition was listed before the Constitution bench on 27.02.2020, 03.03.2020, 04.03.2020,05.03.2020 and 17.03.2020. However, the same did not reach for hearing.

10. That in recent years questions have been raised about the conduct of the Election Commission in its supervision and management of the election process. It is the responsibility of the Election Commission to conduct the elections in a free, fair, impartial, and efficient manner because the sanctity of elections is the most important requirement in the Indian Democracy. Unfortunately, there has been a growing impression that the Election Commission is indulgent towards the ruling government at the centre, and the commission has a different standard to determine the actions of the members of the ruling government and the complaints that arise during the campaign/elections.

11. That in March, 2021, The Citizens' Commission on Elections (CCE) chaired by the retired Supreme Court Judge, Justice Madan B. Lokur, in its second Report titled "*An Inquiry into India's Election System*" of March, 2021, examined the critical aspects of Parliamentary elections of 2019. The Commission highlighted several instances of inaction or omission on the part of the Election

Commission which has raised doubts regarding its fairness and neutrality. The report with respect to Electoral Process and Model Code of Conduct has said:

- ❖ *"For Parliament Election-2019, ECI deliberately delayed the announcement to enable the PM to complete the inauguration blitz of a slew of projects (157 of them) that he had scheduled between February 8 and March 9.*
- ❖ *It was the longest election in the country's history, and its scheduling gave room for suspicion that it had openly and unabashedly favoured the ruling party.*
- ❖ *Some of the major controversies of MCC pertain to (a) Lack of consistency by the ECI in enforcing the MCC, (b) ECI treating the ruling party with kid gloves, (c) ECI not using its powers under Article 324 of the Constitution.*
- ❖ *The Election Commissioner who dissented and stood his ground was eased out from the ECI.*
- ❖ *This is a very critical issue because the major raison d'être of the MCC was to provide a level-playing field to all contesting political parties. Dealing with the ruling party with kid gloves negates the very reason for the existence of MCC.*

❖ *One of the most disturbing phenomena in this election was the abuse/ misuse of Armed Forces for election purposes by the party in power. Propaganda went to the extent of calling Indian Army 'Modi's Sena' causing anger among Veterans. This forced a large number of veterans to write to the President of India that received no response."*

A true copy of the relevant pages of Report of the Citizen's Commission on Elections of March, 2021 is annexed and marked as **ANNEXURE P-5 (Page No. 60 to 90)**.

12. That a similar pattern of inaction and abdication of the functions and duties of the Election Commission was seen in the recent round of assembly elections in various states(State of Tamil Naidu, Assam, Kerala and Union Territory of Pondicherry), especially in the State of West Bengal. The Caravan, in its article titled as "*The Biased Referee*" has highlighted several instances in order to show Election Commission's blatant biasness in favor of the ruling government. A true copy of The Caravan article dated 31.03.2021 titled "The Biased Referee" is annexed and marked as **ANNEXURE P-6 (Page No. 91 to 105)**.

13. That it is relevant to state that the appointment on the post of the head and members of many other Authorities are being made on the recommendation of an independent and neutral statutory

collegium/ selection committee. Illustration of such Authorities may be quoted herewith as follows:

i. Chief Information Commissioner/ Information Commissioner - are appointed on the recommendation of the Committee consisting of Prime Minister, Leader of the Opposition in the Lok Sabha and one Union Cabinet Minister to be nominated by the Prime Minister u/s 12(3) of the Right to Information Act, 2005.

ii. Chairperson and member of the National Human Right Commission - are appointed on the recommendation of the Committee consisting of Prime Minister, Speaker, Home Minister, Leader of the Opposition in the Lok Sabha, Leader of the Opposition in the Rajya Sabha and Deputy Chairman of Rajya Sabha u/s 4 of the Protection of Human Right Act, 1993.

iii. Chief Vigilance Commissioner & Vigilance Commissioners - are appointed on the recommendation of the Committee consisting of Prime Minister, the Minister of Home Affairs and Leader of the Opposition in the Lok Sabha u/s 4(1) of the Central Vigilance Commission, Act, 2003.

iv. Director of Central Bureau of Investigation - is appointed on the recommendation of the Selection Committee consisting of Prime Minister, Leader of the Opposition in the Lok Sabha and Chief Justice of India under the Delhi Special Police Establishment Act, 1946.

- v. Lokpal and Members - is appointed on the recommendation of the Selection Committee consisting of (a) 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 u/s 4(1) of the Lokpal and Lokayuktas Act, 2013.
- vi. Chairman: Press Council of India- is appointed on the recommendation of the Committee consisting of Chairman of the Council of States (Rajya Sabha), the Speaker of the House of the People (Lok Sabha) and a person elected by the members of the Council u/s section 5 of the Press Council Act, 1978.
14. That democracy is a facet of the basic structure of the constitution and in order to ensure free and fair election and to maintain healthy democracy in our country, the Election Commission should be insulated from political and/or executive interference. The practice of appointment of members of Election Commission by the government creates apprehensions regarding the neutrality of the Commission. Further, in recent years the Election Commission has acted as an organ of the Central Government rather than an independent agency.
15. The recent incidents and examples have shown the partisan behavior of the Election Commission in favor of the appointing

authority or ruling party. It is to further substantiate that it is in the interest of justice to issue the necessary directions/ guidelines on the lines of the recommendations of Law Commission in its 255th report of March 2015; Second Administrative Reform Commission in its fourth Report of January 2007; Dr. Dinesh Goswami Committee in its Report of May 1990; and Justice Tarkunde Committee in its Report of 1975 to fill the vacuum occurred on account of the aforesaid inaction till such time the legislature steps in to cover the gap or the executive discharges its role.

16. The Petitioner has not filed any other similar petition before this Hon'ble Court or any High Court or any other Court. The Petitioner has no better remedy available.

GROUND

The reliefs claimed and the direction and orders sought in the instant Petition are on the grounds set out herein-below and each of the grounds may be treated as being cumulative as well as being in the alternative and without prejudice to one another.

- A. BECAUSE the appointment of Chief Election Commissioner and Election Commissioner solely by the executive is incompatible with Article 324(2). Article 324(2) mandates Parliament to make a just, fair, and reasonable law. Also, Dr. B.R. Ambedkar amended the original text and introduced "subject to any law made in that behalf by Parliament" with the hope that in due course of time the Government will take an

initiative to make a fair, just and reasonable law for the appointment of the members of the Election Commission to ensure its independence and integrity.

B. BECAUSE the appointment of the members of the Election Commission solely by executive is incompatible with the preambular values and basic features of the Constitution. Democracy is a facet of the basic structure of the constitution and in order to ensure free and fair elections and to maintain healthy democracy in our country, the Election Commission should be insulated from political and/or executive interference. There is no doubt that 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. However, the appointment of members of Election Commission on the pick and choose of the executive violates the very foundation for which it was created, thus, making the Commission a branch of executive.

C. BECAUSE 'Integrity and Independence of Election Commission' is the basic feature of the Constitution of India in view of the fact that its functioning greatly determines the quality of governance and strength of democracy and adopting the process of appointment of the member to the Election Commission solely on the recommendation of the executive at Centre without evolving fair and reasonable selection process, is undermining the 'Integrity and Independence of Election Commission'.

D. BECAUSE this Hon'ble Court in ***Roger Mathew v. South Indian Bank Ltd., (2020) 6 SCC 1*** while declaring the composition of Search-cum-Selection Committee, which was dominated by the members from central government in Column 4 of the Schedule to the Tribunal, Appellate Tribunal and Other Authorities (Qualification, experience and other conditions of service of members) Rules, 2017, as unconstitutional observed:

"153. We are of the view that the Search-cum-Selection Committee as formulated under the Rules is an attempt to keep the judiciary away from the process of selection and appointment of Members, Vice-Chairman and Chairman of Tribunals. This Court has been lucid in its ruling in Supreme Court Advocates-on-Record Assn. v. Union of India [Supreme Court Advocates-on-Record Assn. v. Union of India, (2016) 5 SCC 1] (Fourth Judges case), wherein it was held that primacy of judiciary is imperative in selection and appointment of judicial officers including Judges of the High Court and the Supreme Court. Cognizant of the doctrine of separation of powers, it is important that judicial appointments take place without any influence or control of any other limb of the sovereign. Independence of the judiciary is the only means to maintain a system of checks and balances on the working of legislature and the executive. The executive is a litigating party in most of the litigation and hence cannot be allowed to be a dominant participant in judicial appointments."

Similarly, in the present case the Election Commission is not only responsible for conducting free and fair elections but it also renders a

quasi judicial function between the various political parties including the ruling government and other parties. In such circumstances the executive cannot be a sole participant in the appointment of members of Election Commission as it gives unfettered discretion to the ruling party to choose someone whose loyalty to it is ensured and thereby renders the selection process vulnerable to manipulation.

- E. BECAUSE the process of appointment of the member to the Election Commission also needs to be insulated from the political and executive pressure by evolving a neutral and independent collegium/ committee for fair, just and transparent selection just like other High Constitutional and Legal Authorities like Judge of Supreme Court and High Court; Chief Information Commissioner/ Information Commissioner; Chairperson and members of the National Human Right Commission; Chief Vigilance Commissioner; Director of Central Bureau of Investigation; Lokpal and other members; Chairman: Press Council of India.
- F. BECAUSE the Respondent has failed to implement the recommendations of constituting independent/neutral committee 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.
- G. BECAUSE the inaction of the Respondent in not making appropriate law as contemplated under Article 324 (2) is unwarranted and thus, to

ensure proper implementation of the rule of law, it is in the interest of justice to issue the necessary directions/ guidelines to fill the vacuum occurred on account of the aforesaid inaction till such time the legislature steps in to cover the gap or the executive discharges its role. Such power of issuing directions/ guidelines under Article 32 read with Article 142 of the Constitution of India has also been laid down by this Hon'ble Court in ***VineetNarain v. Union of India, (1998) 1 SCC 226***. The relevant paragraph no. 49 *VineetNarain's* is quoted below:

"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 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 formulate 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."

H. BECAUSE in ***Prakash Singh v. Union of India, (2006) 8 SCC 1***, in order to insulate the Police from executive/ political interference as recommended by various Committees/ Commissions, this Hon'ble Court was pleased to hold, *inter alia*, as follows:

"26. Having regard to (i) the gravity of the problem; (ii) the urgent need for preservation and strengthening of the rule of law; (iii) pendency of even this petition for the last over ten years; (iv) the fact that various commissions and committees have made recommendations on similar lines for introducing reforms in the police set-up in the country; and (v) total uncertainty as to when police reforms would be introduced, we think that there cannot be any further wait, and the stage has come for issuing of appropriate directions for immediate compliance so as to be operative till such time a new model Police Act is prepared by the Central Government and/or the

State Governments pass the requisite legislations. It may further be noted that the quality of the criminal justice system in the country, to a large extent, depends upon the working of the police force. Thus, having regard to the larger public interest, it is absolutely necessary to issue the requisite directions...

29.* The preparation of a model Police Act by the Central Government and enactment of new Police Acts by the State Governments providing therein for the composition of the State Security Commission are things we can only hope for the present. **Similarly, we can only express our hope that all State Governments would rise to the occasion and enact a new Police Act wholly insulating the police from any pressure whatsoever thereby placing in position an important measure for securing the rights of the citizens under the Constitution for the rule of law, treating everyone equal and being partisan to none, which will also help in securing an efficient and better criminal justice delivery system. 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 Government.*

***30.* 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 any cause or matter. All authorities are mandated by Article**

*144 to act in aid of the orders passed by this Court. **The decision in VineetNarain case [(1998) 1 SCC 226 : 1998 SCC (Cri) 307] notes various decisions of this Court where guidelines and directions to be observed were issued in the absence of legislation and implemented till the legislatures pass appropriate legislations.** [emphasis supplied].*

I. BECAUSE this Hon'ble Court in ***Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294*** on the issue of implementation of 170th Law Commission Report and the Vohra Committee Report regarding declaration of, education qualification, assets and pending criminal cases rejected the argument put forth by Union of India and the intervenor- Indian National Congress. The Union of India and Intervener contended that it is for the political parties to decide whether such recommendations should be brought and carried out by way of amendments in the Act and the Rules and that once Parliament has not amended the Act or the Rules despite the recommendation made by the Law Commission or the report submitted by the Vohra Committee, there was no question of giving any direction by the High Court to the Election Commission. This Hon'ble Court while rejecting the argument held that "*it cannot be said that the directions issued by the High Court are unjustified or beyond its jurisdiction*" [Para 47], after observing and holding, inter alia, as follows:

"19. *At the outset, we would say that it is not possible for this Court to give any directions for amending the Act or the statutory Rules. It is for Parliament to amend the Act and the Rules. It is also established law*

that no direction can be given, which would be contrary to the Act and the Rules.

20. However, it is equally settled that in case when the Act or Rules are silent on a particular subject and the authority implementing the same has constitutional or statutory power to implement it, the Court can necessarily issue directions or orders on the said subject to fill the vacuum or void till the suitable law is enacted.

45. Finally, in our view this Court would have ample power to direct the Commission to fill the void, in the absence of suitable legislation covering the field and the voters are required to be well informed and educated about contesting candidates so that they can elect a proper candidate by their own assessment. It is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction by the executive, for whatever reason, the judiciary must step in, in exercise of its constitutional obligations to provide a solution till such time the legislature acts to perform its role by enacting proper legislation to cover the field. The adverse impact of lack of probity in public life leading to a high degree of corruption is manifold. Therefore, if the candidate is directed to declare his/her spouse's and dependants' assets — immovable, movable and valuable articles — it would have its own effect. **This Court in Vishaka v. State of Rajasthan [(1997) 6 SCC 241 : 1997 SCC (Cri) 932] dealt with the incident of sexual harassment of a woman at work place which resulted in**

violation of fundamental right of gender equality and the right to life and liberty and laid down that in the absence of legislation, it must be viewed along with the role of the judiciary envisaged in the Beijing Statement of Principles of Independence of Judiciary in the LAWASIA region. The decision has laid down the guidelines and prescribed the norms to be strictly observed in all work places until suitable legislation is enacted to occupy the field. In the present case also, there is no legislation or rules providing for giving necessary information to the voters. As stated earlier, this case was relied upon in Vineet Narain case [(1998) 1 SCC 226 : 1998 SCC (Cri) 307] where the Court has issued necessary guidelines to CBI and the Central Vigilance Commission (CVC) as there was no legislation covering the said field to ensure proper implementation of the rule of law.

46. To sum up the legal and constitutional position which emerges from the aforesaid discussion, it can be stated that:

6. On cumulative reading of a plethora of decisions of this Court as referred to, it is clear that if the field meant for legislature and executive is left unoccupied detrimental to the public interest, this Court would have ample jurisdiction under Article 32 read with Articles 141 and 142 of the Constitution to issue necessary directions to the executive to subserve public interest. [emphasis supplied]

J. BECAUSE in view of this Hon'ble Court's judgment in ***Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294***, it is respectfully submitted that till an appropriate law is framed by the Parliament in terms of Article 324(2) of the Constitution for the appointment of Chief Election Commissioner and other Election Commissioners, necessary directions, as sought in the instant writ petition, may be given to the Respondent under Article 32 read with Articles 141 and 142 of the Constitution to subserve overwhelming public interest in the appointment of the members of the Election Commission in order to ensure its independence, thereby, preserving the foundation of democracy which has been held to be a part of the basic structure of the Constitution and which includes free and fair elections.

PRAYER

In view of the facts and circumstances aforementioned, it is humbly prayed that this Hon'ble Court may be pleased to: -

- 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. ; and or;

- iii. Grant such other reliefs as this Hon'ble Court may deem fit and proper in light of the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER AS IN DUTY BOUND SHALL EVER PRAY.

PETITIONER THROUGH:

(PRASHANT BHUSHAN)
COUNSEL FOR THE PETITIONER

DRAWN & FILED ON: 16.05.2021
PLACE: NEW DELHI