

Supreme Court of India verdict on ECI appointments

March 3, 2023

In news– A five-judge bench of the Supreme Court recently unanimously ruled that **a high-power committee must pick the Chief Election Commissioner (CEC) and Election Commissioners (ECs).**

What is the challenge?

- According to article 324(2) of the Indian constitution, 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; and regarding the funding of the EC.**
- **As per the current process, the Law Minister suggests a pool of suitable candidates to the Prime Minister for consideration.** The President makes the appointment on the advice of the PM.

What is the court’s verdict?

- The apex court verdict stated that 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.

- The bench made it clear that this will be **subject to any law to be made by Parliament.**
- This means that **Parliament can undo the effect of the SC verdict by bringing in a new law on the issue.**
- **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.
- The Court said that 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.
- **On the issue of funding the EC, the Court left it to the government.** The bench said that they 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.

Debates of the Constituent Assembly as the basis for 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.**
- The verdict states that 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.
- According to the court the deliberate addition of the words “subject to the provisions of any law made in that behalf by Parliament” after prolonged discussions, indicate that 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 CEC and the ECs.
- 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.
- 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.

What was the government's stand?

- The government argued that “in the absence of such a law, the President has the constitutional power.” The

government has essentially asked the court to exhibit judicial restraint.

- The court in its ruling discusses at length its intention to “maintain a delicate balance” on separation of powers.
- The ruling stated that 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.
- The ruling cites past instances of the Court stepping into to fill a gap in the law, including the Vishaka guidelines to curb sexual harassment at workplace, and the interpretation on the process of appointment of judges.