



2026 INSC 1040

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

WRIT PETITION (CIVIL) NO. 14 OF 2024

DR. JAYA THAKUR AND ORS. ... PETITIONERS

VERSUS

UNION OF INDIA AND ANR. ... RESPONDENTS

WITH

WRIT PETITION (CIVIL) NO. 13 OF 2024

GOPAL SINGH ... PETITIONER

VERSUS

UNION OF INDIA AND ANR. ... RESPONDENTS

WITH

WRIT PETITION (CIVIL) NO. 11 OF 2024

NAMAN SHERSTRA AND ANR. ... PETITIONERS

VERSUS

UNION OF INDIA ... RESPONDENT

WITH

WRIT PETITION (CIVIL) NO. 87 OF 2024

**ASSOCIATION FOR DEMOCRATIC
REFORMS ... PETITIONER**

VERSUS

UNION OF INDIA ... RESPONDENT

WITH

WRIT PETITION (CIVIL) NO. 191 OF 2024

**PEOPLE'S UNION FOR CIVIL
LIBERTIES AND ANR.**

... PETITIONERS

VERSUS

UNION OF INDIA

... RESPONDENT

WITH

WRIT PETITION (CIVIL) NO. 272 OF 2024

**LOK PRAHARI THROUGH ITS
GENERAL SECRETARY S.N. SHUKLA**

... PETITIONER

VERSUS

UNION OF INDIA AND ORS.

... RESPONDENTS

O P I N I O N

DIPANKAR DATTA, J.

1. It is a foundational principle of our constitutional scheme that ours is a government of laws, not of men, where the rulers are bound by the law; they can never be above the law. It is in this larger constitutional context that the implications of the present opinion must necessarily be weighed. While the significance of a judicial opinion is not always to be measured by the controversy that occasions it, the present matter calls for an approach alive to the possibility that the opinion of this Court may well outlive the immediate controversy.

2. The principal challenge in this cluster of petitions under Article 32 of the Constitution of India¹ is common and of considerable significance too. Public spirited individuals and societies registered under the Societies Registration Act, 1860 have invoked the writ jurisdiction of this Court, separately, questioning several provisions of the Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023² as *ultra vires* Article 14 read with Article 324 of the Constitution. While the primary challenge is to Section 7³ of the 2023 Act, the subsidiary challenges are to Sections 6⁴ and 8(2)⁵ thereof.
3. There are five applications for intervention [I.A. 62608/2024, I.A. 146198/2026, I.A. 44405/2025, I.A. 177937/2026 and I.A. 297176/2024] filed by individuals in various writ petitions supporting

¹ Constitution

² 2023 Act

³ **7. Selection Committee.**—(1) The Chief Election Commissioner and other Election Commissioners shall be appointed by the President on the recommendation of a Selection Committee consisting of—

(a) the Prime Minister—Chairperson;

(b) the Leader of Opposition in the House of the People—Member;

(c) a Union Cabinet Minister to be nominated by the Prime Minister—Member.

Explanation.—For the purposes of removal of doubts, it is hereby declared that where the Leader of Opposition in the House of the People has not been recognised as such, the leader of the single largest party in opposition of the Government in the House of the People shall be deemed to be the Leader of Opposition.

(2) The appointment of Chief Election Commissioner and other Election Commissioners shall not be invalid merely by reason of any vacancy in or any defect in the constitution of, the Selection Committee.

⁴ **6. Search Committee.**—A Search Committee headed by the Minister of Law and Justice and comprising two other members not below the rank of Secretary to the Government of India, shall prepare a panel of five persons for consideration of the Selection Committee, for appointment as the Chief Election Commissioner and other Election Commissioners.

⁵ **8. Power of Selection Committee to regulate its own procedure.**—(1) The Selection Committee shall regulate its own procedure in a transparent manner for selecting the Chief Election Commissioner or other Election Commissioners.

(2) The Selection Committee may also consider any other person than those included in the panel by the Search Committee.

the cause of the petitioners. On the other hand, one individual applicant by filing I.A. 38815/2025 has sought intervention to oppose the prayers made in the writ petitions.

4. Hearing of the writ petitions commenced on 6th May, 2026 and continued over 4 days (on 7th May, 14th May, 27th May and 30th July, 2026). Learned senior counsel/learned counsel on behalf of the respective petitioners and the supporting intervenors⁶ had concluded their arguments on the merits of the challenge, whereupon Mr. Venkataramani, learned Attorney General for India was called upon to address the Court.
5. Initially, the learned Attorney was heard by this Court to oppose the challenge to the *vires* of the aforesaid sections, laid by the challengers, on merits. However, in gradual course of his arguments, learned Attorney drifted towards contending that the writ petitions raise a substantial question of law as to the interpretation of the Constitution and that this Court, sitting in the present combination of 2-Judges, instead of deciding the contentious issue of constitutionality of Sections 7, 6 and 8(2) of the 2023 Act, may refer such issue to the Hon'ble the Chief Justice of India⁷ for constitution of a Bench of at least 5 (five) Judges in terms of the provisions contained in clause (3) of Article 145 of the Constitution.

⁶ the challengers

⁷ the CJI

- 6.** Mr. Tushar Mehta, learned Solicitor General of India adopted the stance of the learned Attorney and submitted that these writ petitions ought to be so referred, while advancing additional arguments which are proposed to be noted hereafter.
- 7.** Learned senior counsel/learned counsel for the challengers raised vehement objections and contended, in unison, that neither did the Union of India and the other respondents⁸ aver in the counter affidavit that the issue, of which this Court is seized, ought to be referred to a Constitution Bench nor was such an argument advanced at the inception of the hearing by the learned Attorney/learned Solicitor. This, according to the challengers, is nothing but a ploy to delay the final decision on these writ petitions.
- 8.** Even otherwise, on behalf of the challengers, it was argued that no case for a reference does exist and that this Court ought to take the proceedings to its logical conclusions by ruling on the merits of the challenge. Mr. Vijay Hansaria, Mr. Sanjay Parikh, Mr. Gopal Sankaranarayanan, Mr. Shadan Farasat, learned senior counsel; Mr. Prashant Bhushan and Mr. Kaleeshwaram Raj, learned counsel as well as Mr. Shukla were heard at length.
- 9.** The challengers, collectively, have argued as follows:
 - a. Not all the challengers contend that the CJI must necessarily be part of the Selection Committee. Predominantly, the challenge is

⁸ the defenders

to the executive dominance in the appointment mechanism under Section 7 of the 2023 Act.

- b. The Constitution Bench of this Court in **Anoop Baranwal v. Union of India**⁹, not only addressed the constitutional vacuum under Article 324(2), but also held that the Election Commission of India¹⁰ must be insulated from exclusive executive control in appointments (emphasis supplied by counsel). Since Article 324 has already been authoritatively interpreted, the present case only requires application of that settled principle to the 2023 Act.
- c. Since the issue is one of application of settled constitutional principles (emphasis supplied by counsel), and not a substantial question of law relating to the interpretation of the Constitution, a reference is unnecessary. Reference to a Constitution Bench is not warranted merely because the impugned legislation is novel or constitutional in character, lest the threshold under Article 145(3) be rendered meaningless. Reliance was placed on **People's Union for Civil Liberties v. Union of India**¹¹, **Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly**¹², **State of J&K v. Thakur Ganga Singh**¹³, and **Abdul Rahim Ismail C. Rahimtoola v. State of Bombay**¹⁴.

⁹ (2023) 6 SCC 161

¹⁰ ECI

¹¹ (2003) 4 SCC 399

¹² (2020) 2 SCC 595

¹³ AIR 1960 SC 356

¹⁴ 1959 SCC OnLine SC 60

- d. Even independent of **Anoop Baranwal** (supra), placing the appointment of Election Commissioners substantially under executive control compromises the constitutional balance, particularly because the executive itself is a participant in the electoral process.
- e. Plea for reference under Article 145(3) has been raised after the matter had remained pending for about two years, despite no such contention in the counter-affidavit. Reliance was placed on **Madras Bar Association v. Union of India**¹⁵, to contend that such an eleventh-hour approach should be deprecated and disapproved.
- f. Several constitutional challenges have been decided by smaller Benches and the mere fact that constitutional validity is in issue does not warrant a reference to a Constitution Bench. Reliance was placed on **Shreya Singhal v. Union of India**¹⁶; **Nikesh Tarachand Shah v. Union of India**¹⁷; **NALSA v. Union of India**¹⁸; **Anuj Garg v. Hotel Association of India**¹⁹; **Subramanian Swamy v. Union of India**²⁰; **Indian Hotel & Restaurant Assn. v. State of Maharashtra**²¹; **Lily Thomas v.**

¹⁵ (2026) 2 SCC 1

¹⁶ (2015) 5 SCC 1

¹⁷ (2018) 11 SCC 1

¹⁸ (2014) 5 SCC 438

¹⁹ (2008) 3 SCC 1

²⁰ (2016) 7 SCC 221

²¹ (2013) 8 SCC 519

***Union of India*²²; *D.K. Basu v. State of West Bengal*²³; *Nandini Sundar v. State of Chhattisgarh*; *Independent Thought v. Union of India*²⁴, *Pattali Makkal Katchi v. A. Mayilerumperumal*²⁵ and *Union of India v. Rajendra N. Shah*²⁶.**

- g. ***Anoop Baranwal*** (supra) traced Article 324 to the Constituent Assembly Debates²⁷ and held that the constitutional scheme was intended to prevent exclusive executive control (emphasis supplied by counsel) over appointments. The absence of legislation was treated as creating a constitutional vacuum. Article 324(5) provides safeguards against removal and adverse alteration of service conditions, but ***Anoop Baranwal*** (supra) recognised that a more fundamental requirement is that the appointment itself must not be exclusively controlled by the executive (emphasis supplied by counsel).
- h. The challengers characterise the issue as whether the legislature has validly removed the basis of ***Anoop Baranwal*** (supra), rather than whether Article 324 itself requires fresh interpretation. This is, therefore, an exercise in applying settled law.

²² (2013) 7 SCC 653

²³ (1997) 1 SCC 416

²⁴ (2017) 10 SCC 800

²⁵ (2023) 7 SCC 481

²⁶ (2021) 9 SCC 1

²⁷ CA Debates

- i. A reference to 5 (five) Judges would effectively permit the defenders to challenge or seek reconsideration of **Anoop Baranwal** (supra) without following the proper procedure for reconsideration of a binding precedent.
- j. **Anoop Baranwal** (supra) is binding under Article 141 and that the 2023 Act effectively seeks to legislatively overrule the judgment, which is impermissible. Reliance was placed on **Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality**²⁸; **Municipal Corpn. of the City of Ahmedabad v. New Shrock Spg. and Wvg. Co. Ltd.**²⁹; **Madan Mohan Pathak v. Union of India**³⁰; **In re: Cauvery Water Disputes Tribunal**³¹; **PUCL v. Union of India**³²; **State of Karnataka v. Karnataka Pawn Brokers Assn.**³³; and **Medical Council of India v. State of Kerala**³⁴.
- k. Independently, it was contended that the 2023 Act violates Articles 14 and 19, since independence of the body supervising elections is integral to equality and democratic governance.

²⁸ (1969) 2 SCC 283

²⁹ (1970) 2 SCC 280

³⁰ (1978) 2 SCC 50

³¹ 1993 Supp (1) SCC 96 (2)

³² (2003) 4 SCC 399

³³ (2018) 6 SCC 363

³⁴ (2019) 13 SCC 185

l. Relying on ***Rao Shiva Bahadur Singh v. State of Vindhya Pradesh***³⁵, Mr. Raj contended that a reference is not called for in the present facts and circumstances.

m. Finally, after the order on these petitions was reserved, Mr. Gopal Sankaranarayanan submitted a written note relying on ***Keshav Mills Co. Ltd. v. CIT***³⁶ to oppose the defenders' prayer for a reference. He submitted that a reference to a larger Bench or reconsideration of an earlier decision is warranted only for compelling reasons or in the larger public interest, neither of which is present here. According to him, entertaining the plea would effectively enable the defenders to seek a dilution of the principles laid down in ***Anoop Baranwal*** (supra) which would be against public interest. Reliance, in this connection, was also placed on an opinion rendered by one of the Judges of the 9-Judge Bench in ***State of Uttar Pradesh v. Jai Bir Singh***³⁷, where the principles in ***Keshav Mills*** (supra) were applied to reject the reference therein as being erroneous.

10. Learned Attorney, on behalf of the defenders, advanced elaborate submissions which are noted hereunder.

a. The contentions of the challengers precede on the premise, *albeit* incorrectly, that the question of law laid down by this Court in

³⁵ 1955 (1) SCC 539

³⁶ AIR 1965 SC 1636

³⁷ 2026 INSC 897

Anoop Baranwal (supra) categorically occupies the field of law and does not leave any room for an alternate view by the Parliament on the subject of matters relating to the ECI. Such submission of the challengers is inherently incorrect. The questions that this Court must answer here have not been dealt with by this Court in any prior decision including **Anoop Baranwal** (supra). Such questions mandatorily require an interpretation of the Constitution and not mere application.

- b. Reliance, in support, was placed on a catena of decisions of this Court, viz. **State v. Kalyan Singh**³⁸, **Union of India v Rajeev Bansal**³⁹, **Dayaram v. Sudhir Batham**⁴⁰, **Maharashtra Adiwasi Thakur Jamat Swarakshan Samiti v. State of Maharashtra**⁴¹ and **Kalyan Chandra Sarkar v Rajesh Ranjan**⁴² to contend that a clear distinction exists between the law declared by this Court under Article 141 of the Constitution and directions issued under Article 142 for doing complete justice. According to him, while the former constitutes binding precedent, the latter is confined to the peculiar exigencies of the case and does not possess the same precedential force. Proceeding on this premise, it was urged that the directions issued in **Anoop Baranwal** (supra) were not a declaration of law under Article 141

³⁸ (2017) 7 SCC 444

³⁹ 2024 INSC 754

⁴⁰ (2012) 1 SCC 333

⁴¹ (2023) 16 SCC 415

⁴² (2005) 3 SCC 284

but merely interim measures fashioned in exercise of the Court's powers under Article 142 to fill a legislative vacuum. Developing the point further, it was submitted that such directions were intended to operate only until the Parliament enacted an appropriate law. Consequently, with the field now occupied by legislation, the directions in **Anoop Baranwal** (supra) cease to have any independent relevance and cannot furnish a basis for assailing the constitutional validity of the impugned enactment.

- c. While addressing the challenge to the impugned legislation, *albeit* without detracting from the plea for a reference, it was contended that the mere fact of the Selection Committee comprising the Prime Minister, a Union Cabinet Minister and the Leader of the Opposition cannot, by itself, justify an inference of bias, partisanship or institutional unfairness in the process of appointment. The impugned enactment represents a considered exercise of legislative wisdom by the Parliament and rests on the well-settled constitutional presumption that high constitutional functionaries, particularly the Prime Minister, would discharge their duties with objectivity, fairness and due regard to the larger public interest. The legislature has consciously constituted a collegial body comprising high constitutional functionaries and the decision of such a body is intended to operate through collective institutional deliberation. The composition of the Committee cannot be viewed through a lens of suspicion merely because the

executive enjoys a numerical majority therein. Therefore, the contention of the challengers that the impugned legislation has led to executive dominance in the appointment process merits rejection. The decision of this Court in ***CPIL v Union of India***⁴³ was cited in support of the aforesaid submission.

d. In light of the above, it was urged that at this juncture, the Court has to consider whether judicially evolved norms can preclude the Parliament from enacting a different legislative framework; whether a law may be invalidated solely for departing from a judicially expressed view; whether the principle of separation of powers preserves the Parliament's authority to independently legislate on the subject; and whether the impugned law can be struck down in the absence of material demonstrating any actual threat to the independence of the ECI. These are, in essence, questions which squarely attract clause (3) of Article 145 of the Constitution and warrant consideration by a Bench of not less than 5 (five) Judges.

11. While, however, arguing on the same lines as the learned Attorney for referring these petitions to a Bench of not less than 5 (five) Judges, the learned Solicitor referred to Order XXXVIII, Rule 1 of the Supreme Court Rules, 2013⁴⁴ which, he submitted, is a virtual re-enactment of Article 145(3). According to him, the desirability of deliberations and

⁴³ (2011) 4 SCC 1

⁴⁴ SCR

application of mind by a larger Bench will always be a persuading factor whilst interpreting the Constitution.

12. Apart from so urging, the learned Solicitor too touched upon the merits of the challenge laid.
13. A part of the learned Solicitor's submissions related to the constitutional trust that the people have reposed in the Prime Minister; in the next part, he urged this Court to appreciate that **Anoop Baranwal** (supra) cannot bind the legislature from enacting a law contrary thereto; and the final part was confined to providing justification for not including the CJI in the body of selectors.
14. On the point of constitutional trust, the learned Solicitor invited this Court's attention to certain passages from the decision of the Constitution Bench in **Manoj Narula v. Union of India**⁴⁵. According to him, it was the view of none other than Dr. B. R. Ambedkar that if the Prime Minister of the country cannot be trusted, no one else can be trusted.
15. Learned Solicitor next argued that if it were to be held that the legislature is not permitted to travel beyond the decision of this Court in **Anoop Baranwal** (supra), it would, in essence, destroy the basic structure of the Constitution. According to him, **Anoop Baranwal** (supra) introduced a *pro tem* measure, and the guidelines laid down must be restricted to the point of law raised therein.

⁴⁵ (2014) 9 SCC 1

16. In the final part, the learned Solicitor, while defending the impugned legislation which excludes the CJI, also buttressed his argument by drawing a parallel with judicial appointments. Referring to the criticism widely canvassed for quite some time past that ‘Judges appoint Judges’ — a criticism which, it may be noted, has also found pronounced expression in the views of several jurists concerned with the functioning, accountability and institutional independence of the judiciary — he was heard to contend that if participation of outsiders is not envisaged in the appointment of Judges of this Court and the High Courts under the Collegium system of appointment of Judges, a similar objection cannot be raised in the context of appointments of the Election Commissioners comprising the ECI. According to him, it has been articulated in various quarters that the criticism is not limited to the participation or non-participation of outsiders, but extends to the broader question whether judicial independence can be understood to exclude all forms of scrutiny, accountability and institutional corrective measures. He referred to public acknowledgement of mistake by Hon’ble Judges (since retired) who had passed verdicts in favour of the Collegium system of appointment. While acknowledging that independence of the judiciary is important, it was urged that the independence of the other two organs is also crucial and equally important and should be respected. Further, it was argued that the Parliament, being directly accountable to the people, is competent to prescribe the composition of the Selection Committee, and the

impugned legislation cannot be questioned merely because it excludes the CJI or any other neutral selector from the appointment process.

- 17.** The argument of the learned Solicitor on the final part seeking to draw a parallel with judicial appointments (made orally, and does not form part of the written submissions), in the considered opinion of this Court, has a bearing on the integrity of the institution. Though not too relevant for the purpose of giving an opinion on the question of whether a reference is called for, which is presently under consideration, his reference to “Judges appointing Judges” seeks to revive an old criticism and, unwittingly, travels beyond the present *lis*. Avoidable in the context of the present challenge, reference to the criticism on such a sensitive issue ought best to have been left alone. In course of hearing, this Court preferred not to seriously react. The first instinct too, while writing this opinion, was to be reticent and let such criticism pass. But, on a second thought, it is realised that the judiciary cannot always be at the receiving end. A couple of relevant observations in response need to be made, lest the silence be misunderstood as a tacit acceptance by the Court of such unworthy criticism in circulation.
- 18.** It is, thus, deemed proper to examine briefly, hereafter, the nature of duty entrusted to the Collegium and its working ever since it was institutionalised by the Constitution Bench decisions in ***Supreme Court***

Advocates-on-Record Association v. Union of India⁴⁶ and ***In Re: Special Reference No.1 of 1998***⁴⁷ and the executive's role.

19. At its core, the collegium system has indeed faced criticism from various quarters principally on the ground that it functions without any external participation and is entirely Judge-driven, in matters concerning selection and appointment to other conditions of service like transfer. It is undeniable that the Collegium system has occasionally faltered and its functioning has not been entirely free from aberrations. However, vociferous criticism, by itself, does not offer an alternative. While the absence of an outsider in the process may invite scrutiny, executive supremacy cannot be the cure. The constitutional quest is not to transfer primacy from one organ to another, but to secure a system that preserves institutional independence through calibrated checks and balances, and fidelity to judicial independence. The Parliament's initiative to introduce the National Judicial Appointments Commission to replace the Collegium system did not fructify, for, the relevant constitutional amendment and the statutory provisions were found to breach the basic feature of judicial independence and, thus, declared *ultra vires* by this Court in ***Supreme Court Advocates-on-Record Association v. Union of India***⁴⁸. Such decision too faced severe criticism; but, although much water having flown under the bridge since the relevant legislation was outlawed, so far, for all the criticism, no

⁴⁶ (1993) 4 SCC 441

⁴⁷ (1998) 7 SCC 739

⁴⁸ (2016) 5 SCC 1

other alternative model that is demonstrably superior for the judiciary in this country has been suggested. Despite all its opacity and imperfections, the Collegium system still remains the most viable option for safeguarding independence, as envisioned under Article 50 of the Constitution by its framers. Like every other system, it is axiomatic that the Collegium must evolve to subserve the interests of all the stakeholders and must constantly reform its working to address the criticism levelled against it. Nonetheless, one need not look to foreign jurisdictions for cautionary tales of what happens when the fine balance between judicial independence and executive influence collapses; our own constitutional history offers enough lessons. Criticism may be abundant, but a viable substitute being conspicuously absent, the deficiencies cannot be used as a justification to usher in participation of the executive in the Collegium deliberations.

- 20.** Having said so, it is considered absolutely necessary to address a misconception that has been allowed to proliferate. The oft-repeated phrase that “Judges appoint Judges” is a myth, which people have been fed by vested interests through motivated narratives, often drawing sustenance from certain controversial decisions taken in this century in relation to appointment of Judges. A sweeping generalisation that the Collegium acts as a law unto itself overlooks the detailed consultative process envisaged under the Constitution, and the intrinsic role of the executive — both at the Centre and in the States — as well as intelligence and other agencies in the appointment process including

vetting of credentials, and the fact that every appointment bears the imprimatur of the President. The uninitiated and the unversed, unknowingly, have thus been made to believe that the Collegium of the Supreme Court and the collegia of the High Courts comprise of “Judges, who appoint Judges”; and, it has become fashionable nowadays to blame the Collegium for every infelicitous choice, conveniently forgetting that aberrations are exceptions and not the norm, and that no system can guarantee infallibility of human choice. Perhaps, none else other than the Government knows better how the Collegium system works.

- 21.** Equally important is to put the discourse in perspective. The role of the Collegium, insofar as selection is concerned, is nothing more than recommendatory. At every stage prior to the recommendations taking shape, the executive is involved. Whispers are heard in the corridors that unless approval of the [...]; however, let whispers remain whispers and not drown the constitutional wisdom that has sustained the institution.
- 22.** What is, however, unmissable is that even at the end of the day, acceptance of the recommendations is within the exclusive domain of the executive; it may, or may not, accept the recommendations. The final say, rests with the executive. For the past year and a half or so, advocates/judicial officers recommended for elevation by the collegia of the High Courts are called upon to interact with the Hon’ble Judges forming part of the Collegium, led by the CJI, whereafter those who are

found to be suitable in all respects are finally recommended. However, it is not infrequent that out of a list of advocates/judicial officers ultimately recommended by the Collegium, one or a couple of them are held back by the executive and not elevated as Judges. The system is so calibrated that the executive can override the recommendation of the CJI led Collegium, notwithstanding the precedents mandating that primacy has to be given to the opinion of the CJI. On multiple occasions, recommendations have not been acted upon by the executive without reasons being disclosed and available in the public domain; and a few of them, even after reiteration, have been left to gather dust for years. Even recommendations for transfer of Judges made by the Collegium in the interest of administration of justice are not acted upon by the executive in a number of cases. If the recommendations of the Collegium of the Supreme Court were binding in nature, the same would certainly have been implemented in their entirety. Unfortunately, the records tell a different story. Informed by prudence, the institutional faultlines with specifics are not considered worth discussing here. Suffice it to observe, the institution of the judiciary would have been richer had sheer merit, unimpeachable integrity, and sterling character always counted for appointments/elevations to the High Courts and the Supreme Court. Several persons possessed of the aforesaid qualities have been overlooked in the past and, thus, not elevated as High Court Judges, and even as Judges of the Supreme Court owing to reasons

other than merit. Those involved in the process, i.e., from the executive and the judiciary, know better the real reasons for such exclusion.

- 23.** What is most worrying and needs attention for a remedy is that the sanctity of a Collegium resolution is lost each time the executive implements it selectively, *albeit* approving majority of those recommended while withholding at least one. Undeterred by such piecemeal approvals and regardless of the fate of those not cleared by the executive, the Collegium chooses to proceed, seemingly, to avoid a head-on conflict with the executive and left with a Hobson's choice to keep the institution running. What it thereby averts, arguably, is a constitutional crisis; but the larger question which looms is: how long can this state of affairs continue, if such selective implementation is allowed to acquire the character of an accepted practice?
- 24.** Dr. B. R. Ambedkar's vision was that the judiciary must both be independent of the executive and be competent in itself. However, given the present situation, that vision appears blurred and under serious strain. This Court is left to wonder why, even after the judiciary has been relegated to playing second fiddle to the executive in the matter of appointment of Judges, is there still a clamour to induct an outsider at the stage of selection? Coming as it does from the side of the executive, the argument ill-behoves its stature and is a feeble attempt to deflect attention from its own dereliction and failure.
- 25.** This part of the discussion is concluded by observing that since it is the executive that wields decisive control and holds the reins over

appointments of Judges at every stratum, the response of the defenders for sustaining the impugned legislation by seeking to draw a parallel with the Collegium system of not having an outsider is rather disingenuous, evasive and disquieting. At the same time, this Court expresses hope and trust that henceforth only judicious and apposite choices shall be made by the present Collegium, under the able leadership of the CJI, leaving little room for future criticism of the system's working.

26. Now, to refer — or not to refer — the petitions to a Constitution Bench in the light of what is provided in clause (3) of Article 145⁴⁹ of the Constitution read with Order XXXVIII⁵⁰ of the SCR, 2013 which have been heavily relied on by the defenders is the short but fundamental question before this Court, which is sought to be answered.
27. The essence of the submissions of the challengers has been that the decision of the Constitution Bench in **Anoop Baranwal** (supra) and the other decisions, relied upon by them, leave little room for upholding the

⁴⁹ **Article 145. Rules of Court, etc.-**

3) The minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of this Constitution or for the purpose of hearing any reference under Article 143 shall be five:

Provided that, ***

⁵⁰ APPLICATIONS FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS

1.(1) Every petition under article 32 of the Constitution shall be in writing and shall be heard by a Division Court of not less than five Judges provided that a petition which does not raise a substantial question of law as to the interpretation of the Constitution may be heard and decided by a Division Court of less than five Judges, and, during partial Court working days, by the Judge sitting singly.

(2) All interlocutory and miscellaneous applications connected with a petition under article 32 of the Constitution, may be heard and decided by a Division Court of less than five Judges, and, during partial Court working days, by the Judge sitting singly, notwithstanding that in the petition a substantial question of law as to the interpretation of the Constitution is raised.

impugned provisions as *intra vires*. The law having thus crystallised, the plea for a reference is absolutely not well-founded and untenable.

- 28.** In view of the rival arguments, much would depend on how this Court reads the scholarly opinion rendered by this Court in **Anoop Baranwal** (supra). Does the decision, within the meaning of Article 141 of the Constitution, declare a law which is binding? Or, is it a decision which has to be understood as an authority for the question it answered?
- 29.** Before embarking on the analysis and since the learned Solicitor has invited the attention of this Court to the decision of the Constitution Bench in **Manoj Narula** (supra), where reputed authors and jurists have been quoted, walking down memory lane to ascertain what Dr. B.R. Ambedkar, the main architect of the Indian Constitution, had to say about the role of the Prime Minister and the doctrine of constitutional trust, would seem largely relevant in the present context.
- 30.** Responding to the proposal for the amendment suggested by Prof. K.T. Shah with regard to introduction of a disqualification of a convicted person becoming a Minister in the Council of Ministers in the Constitution itself, which is quoted in paragraph 83 of the Constitution Bench decision in **Manoj Narula** (supra), Dr B.R. Ambedkar had replied: (CA Debates Vol. VII, p. 1160)

"His last proposition is that no person who is convicted may be appointed a Minister of the State. Well, so far as his intention is concerned, it is no doubt very laudable and I do not think any Member of this House would like to differ from him on that proposition. But the whole question is this: whether we should introduce all these qualifications and disqualifications in the Constitution itself. Is it not desirable, is it not sufficient that we should trust the Prime Minister, the legislature and the public at large watching the actions of the Ministers and the actions of the legislature to see that no

such infamous thing is done by either of them? I think this is a case which may eminently be left to the good sense of the Prime Minister and to the good sense of the legislature with the general public holding a watching brief upon them. I therefore say that these amendments are unnecessary.”
(emphasis added)

31. The hope, faith and trust that Dr. Ambedkar reposed in the office of the Prime Minister and parliamentary democracy appears to have fast eroded within a couple of years of India gaining independence. In his address⁵¹ on 28th October, 1951 on “FAILURE OF PARLIAMENTARY DEMOCRACY WILL RESULT IN REBELLION, ANARCHY AND COMMUNISM”, Dr. Ambedkar’s lament cannot go unnoticed⁵². For the sake of brevity, relevant excerpts from it are quoted hereunder:

“Today the same thing is happening. Congress is accepting the financial help of the Banias, Marwaris and other multi-millionaires. Congress is eating their food and it follows, therefore, naturally that Congress will have to take the side of these ‘Big Business’ at all crucial times.
We also find that the Government servants are influencing the elections in favour of the party which is feeding them and their dependants. No less a personality than Dr. Shyama Prasad Mukherjee, at the inaugural session of the Bhartiya Jan Sangh at Delhi recently, openly charged the Government servants of helping the Congress and thereby nullifying the elections from being free and fair. Under these circumstances, do you, gentlemen, think that there is any hope for the Parliamentary Democracy to succeed.
If Parliamentary Democracy fails in this country and it is bound to fail for the reasons mentioned by me, the only result will be rebellion, anarchy and Communism. ... Gentlemen, I want you to take note of these eventual certainties and if you wish that Parliamentary System of Government and Parliamentary Democracy prevail in this country, if you are satisfied that we will be assured of our liberty of thought, speech and action, if we should preserve our independence, if we cherish the inherent right of individual liberty, then it is your duty as students, as intelligent community of our country, to strive your utmost to cherish this Parliamentary System of Government in its true spirit and work for it.”

(emphasis added)

⁵¹ to the students’ Parliament of D.A.V. College, Jullundar City (Punjab)

⁵² Dr. Babasaheb Ambedkar, ‘Failure of Parliamentary Democracy will result in Rebellion, Anarchy And Communism’, Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 17 Part III, published by the Dr. Ambedkar Foundation Ministry of Social Justice and Empowerment, Government of India, at pages 422-428

- 32.** While this Court cannot comment on the factual assertions made by Dr. Ambedkar in the aforesaid extract, one thing is clear: even in the nascent years of Indian independence, Dr. Ambedkar expressed a fear of institutional capture of the electoral process which could contribute to the failure of parliamentary democracy in India. It is proposed to allude to this aspect further in the paragraphs that follow.
- 33.** Soon followed Dr. Ambedkar's speech titled 'CONDITIONS PRECEDENT FOR THE SUCCESSFUL WORKING OF DEMOCRACY', which was delivered on 22nd December, 1952⁵³ before the members of the Poona District Law Library. As per Dr. Ambedkar, there were a few essential conditions precedent for the success of modern democracy. These are (i) the absence of inequality; (ii) the existence of opposition; (iii) equality in law and administration and; (iv) the observance of constitutional morality.
- 34.** For the purposes of this opinion, it is deemed apposite to notice what Dr. Ambedkar had mentioned regarding conditions (ii) and (iv).
- 35.** In respect of condition (ii), while Dr. Ambedkar was undoubtedly speaking of the need for a formally recognized political opposition in the Parliament, it is worth reproducing some of his observations in this regard. In the considered opinion of this Court, these cannot be reduced to merely observations regarding a political opposition but, rather, go to the root of his conception of democracy.

⁵³ Dr. Babasaheb Ambedkar, 'Conditions Precedent for the Successful Working of Democracy', Dr. Babasaheb Ambedkar: Writings and Speeches, Vol. 17 Part III, published by the Dr. Ambedkar Foundation Ministry of Social Justice and Empowerment, Government of India, at pages 473-486

"What does democracy mean? I am not defining it. I am asking a functional question. It seems to me that democracy means a veto of power. Democracy is a contradiction of hereditary authority or autocratic authority. Democracy means that at some stage somewhere there must be a veto on the authority of those who are ruling the country. In autocracy there is no veto. The King once elected is there with his inherent or divine right to rule.

...

There is no veto on the part of anybody on the power of the King. But in democracy we have provided, that at every five years those who are in authority must go to the people and ask whether in the opinion of the people they are well qualified to be entrusted with power and authority to look after their interest, to mould their destiny, to defend them."

(emphasis added)

- 36.** Insofar as condition (iv) is concerned, Dr. Ambedkar argued that the successful working of democracy required the observance of constitutional morality. Dr. Ambedkar characterized constitutional morality as the unwritten conventions and self-restraint that gives substance to a constitution's bare legal skeleton. A written constitution, he argued, is only a framework of legal provisions and its survival depends on those who hold power voluntarily abiding by "*the rules of the game*", even when they were not legally compelled to.
- 37.** Closely linked to the aforementioned four conditions, in the same speech, Dr. Ambedkar also insisted that there could be no tyranny of the majority over the minority, and there must exist a functioning moral order in society for democracy to be successful.
- 38.** There also exists record of Dr. Ambedkar's disillusionment at the dawn of the Constitution, not with parliamentary democracy as an idea, but with how it was working in India. He clarified that the Constitution he made was workable, but people in power had made it unworkable. Deeply critical of the limitations of traditional parliamentary democracy,

he famously cautioned that India risked maintaining a democracy “in form” on the surface while degenerating into a “dictatorship in fact” if social inequalities were not actively dismantled.

- 39.** Notably, a couple of years before his departure from this mortal world, Dr. Ambedkar in an interview to the BBC while talking about the working of parliamentary democracy in India could not hide his disappointment and seemed to be completely dejected and depressed. The interview reveals Dr. Ambedkar expressing his views on the state of elections conducted in the country. He observed, with some dismay, ‘elections are important provided they produce really good men’. Turning back to what he stood for—reform of the social structure—he emphasized the need for political representation accompanied by social transformation, cautioning that democratic institutions would remain inadequate unless they produced leaders committed to dismantling entrenched social inequalities and securing genuine equality.
- 40.** At this juncture, profitable reference may further be made to what the distinguished jurist H.M. Seervai had to say about the working of the cabinet form of Government. In his treatise on Constitutional Law⁵⁴, the learned author observed:

“18.57. The Constitution does not guarantee that power would be wisely exercised by the executive.— ... But as long as the political atmosphere remains what it is, the Constitution cannot be worked as it was intended to be worked. It has been said that the Constitution confers power, but it does not guarantee that the power would be wisely exercised. It can be said equally that the Constitution confers power but it gives no guarantee that it will be worked by men of high character, capacity and integrity. If the Constitution is to be successfully worked, an attempt must be made to

⁵⁴ Constitutional Law of India, Vol.2, 4th Edition

improve the political atmosphere and to lay down and enforce standards of conduct required for a successful working of our Constitution."

(emphasis added)

- 41.** After quoting the aforesaid passage in ***Manoj Narula*** (supra), the Constitution Bench had the occasion to repose trust in the office of the Prime Minister in the following words:

99. It is worthy to note that the Council of Ministers has the collective responsibility to sustain the integrity and purity of the constitutional structure. That is why the Prime Minister enjoys a great magnitude of constitutional power. Therefore, the responsibility is more, regard being had to the instillation of trust, a constitutional one. It is also expected that the Prime Minister should act in the interest of the national polity of the nation-State. He has to bear in mind that unwarranted elements or persons who are facing charge in certain category of offences may thwart or hinder the canons of constitutional morality or principles of good governance and eventually diminish the constitutional trust. We have already held that prohibition cannot be brought in within the province of "advice" but indubitably, the concepts, especially the constitutional trust, can be allowed to be perceived in the act of such advice.

100. Thus, while interpreting Article 75(1), definitely a disqualification cannot be added. However, it can always be legitimately expected, regard being had to the role of a Minister in the Council of Ministers and keeping in view the sanctity of oath he takes, the Prime Minister, while living up to the trust reposed in him, would consider not choosing a person with criminal antecedents against whom charges have been framed for heinous or serious criminal offences or charges of corruption to become a Minister of the Council of Ministers. This is what the Constitution suggests and that is the constitutional expectation from the Prime Minister. Rest has to be left to the wisdom of the Prime Minister. We say nothing more, nothing less.

(emphasis added)

- 42.** What is worth pondering in the current situation is, whether the trust is honoured in adequate measure? The Constitution gave us the framework. It did not, rather could not, guarantee its own success. For that, it trusted those who would wield power. Dr. Ambedkar's famous words⁵⁵ rings in our ears even now.

⁵⁵ ... however good a Constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a Constitution may be, it may turn out to be good if those who are called to work it, happen to be a good lot.

- 43.** Experience gained over the years bears testimony to the fault lying in working of the Constitution and not in its text. Over seven decades, every dispensation wresting power found it convenient to keep institutions, which the Constitution envisioned to be independent, under their control. To enact a law on the lines empowered by Article 324(2) would have meant freeing the ECI from exclusive executive control and inviting trouble for the ruling regime. To the mind of this Court, this has not been the failing of any one party or one period. A consistent trait of political power, discernible over the decades, has been to preserve leverage over the very body that is meant to judge its claim to power. What is deciphered from the speech of Dr. Ambedkar delivered in Jullundur is this: Dr. Shyama Prasad Mookherjee was heard/read by Dr. Ambedkar as having pointed out, as early as in 1951, that Government servants were helping the ruling party to ensure electoral success and thereby not rendering free and fair elections. This, Dr. Ambedkar invoked and warned, would endanger parliamentary democracy itself, being the earliest symptom of this trait. It would seem that while asking if parliamentary democracy could at all succeed if the executive were all powerful, the great personality identified the core risk that Article 324(2) was designed to address: executive dominance over the electoral arbiter.
- 44.** Over the years since we (the people of India) gained independence, there has been a change of guard at regular intervals. It is painful to

note that not a single party in power, entrusted by the people of India to govern this great nation, took the initiative of enacting a law of the nature which Article 324(2) left to the supreme law-making body, i.e., the Parliament, to legislate. Placing its own electoral fortunes in the hands of a truly independent arbiter was not favoured by any political party, for obvious reasons. To remain in power, the consistent pursuit through executive action has indeed been simple — influence the composition of the ECI, control the process of appointment of the Chief Election Commissioner⁵⁶ and the Election Commissioners⁵⁷ and, thereby, temper adverse electoral outcomes.

- 45.** This tradition, common to all dispensations, continued for over seven decades until it was broken by the 2023 Act after a necessary judicial intervention. It was the Parliament's first attempt to fill that constitutional vacuum. Whether the 2023 Act fully answers the apprehension of the early days of our Constitution of insulating the ECI from the Government of the day or merely recalibrates executive control, is the question that would arise for examination when the writ petitions are decided on their own merits.
- 46.** Having noted these events from history, which are part of the introductory remarks, and bearing in mind the objections raised by the defenders, this Court now proceeds to deliver its opinion, purely on the basis of a *prima facie* understanding of what precisely was held by the

⁵⁶ CEC

⁵⁷ ECs

Constitution Bench in **Anoop Baranwal** (supra). For this, the need to read the erudite opinion thoroughly does arise. What was the question there and what did the Constitution Bench decide? Let the same be briefly noticed.

- 47.** In **Anoop Baranwal** (supra), the Constitution Bench was called upon to consider the constitutional validity of the existing process for appointment of the CEC and the ECs under Article 324(2)⁵⁸ of the Constitution in the absence of a law made by the Parliament, and the implications thereof for the independence of the ECI.
- 48.** The principal contention urged by the petitioners therein was that, despite clause (2) of Article 324 expressly providing that the appointments of the CEC and the ECs shall be “subject to the provisions of any law made in that behalf by the Parliament”, no such law had been enacted since the commencement of the Constitution. Consequently, appointments continued to be made by the President on the aid and advice of the executive, ordinarily the Prime Minister, under the Rules of Business. It was argued that such a regime imperilled the independence of the ECI, an institution central to the preservation of free and fair elections, democracy, the rule of law, and the guarantees embodied in Articles 14 and 19 of the Constitution. Ancillary prayers

⁵⁸ **Article 324. Superintendence, direction and control of elections to be vested in an Election Commission.-** (1) ***

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.

sought parity in protection against removal of the ECs from office with that enjoyed by the CEC under the first proviso to Article 324(5), and the creation of an independent Secretariat with expenditure charged on the Consolidated Fund of India.

- 49.** Hon'ble K.M. Joseph, J. (as His Lordship then was) spoke for himself and three other Hon'ble Judges comprising the Constitution Bench in ***Anoop Baranwal*** (supra). Upon an exhaustive examination of the CA Debates, the constitutional scheme, comparative constitutional practice and precedents, His Lordship speaking for the majority held that Article 324(2) unmistakably contemplates parliamentary legislation regulating the appointment process of the CEC and the ECs. The expression "*subject to the provisions of any law made in that behalf by Parliament*" was found to be integral to Article 324 and differentiated from similarly worded provisions such as Articles 145, 148 and 243-K. It was observed that while Article 145 enabled the Supreme Court to frame its own rules in the absence of legislation and Article 148 contained no corresponding mandate regarding the appointment of the Comptroller and Auditor General; Article 324(2) deliberately subjected the appointment process itself to parliamentary law. Having regard to the ECI's direct nexus with democracy, the rule of law and constitutional governance, especially in reference to the detailed discussion on this article in the CA Debates, it was held that the provision occupies a distinct constitutional position. Article 243-K was noted, which contemplated appointment of the State Election Commissioner to be made by the Governor. It was also noted

that while inserting the provision, the Parliament was aware of the mandate of Article 324 and consciously chose not to subject the appointment to any law made by it.

- 50.** It was further observed that the failure of the Parliament to enact a law for over seven decades had resulted in a constitutional vacuum of considerable significance. While declining a mandamus to compel the Parliament to legislate, it was held that, where such a vacuum threatens foundational constitutional values, it is competent to exercise its powers under Articles 32 and 142 to lay down interim norms until legislative intervention occurs. Drawing upon the precedents in ***Vineet Narain v. Union of India***⁵⁹, ***Vishaka v. State of Rajasthan***⁶⁰, ***Supreme Court Advocates-on-Record Assn. v. Union of India***⁶¹, and other decisions, it was reaffirmed that where a constitutional vacuum exists and fundamental values of democracy and the rule of law are imperilled, this Court is under a duty to issue appropriate directions under Articles 32 and 142 till such time the Parliament intervenes. Accordingly, the judgment laid down that until a law is made by the Parliament, the appointment of the CEC and the ECs shall be made by the President on the advice of a Committee comprising the Prime Minister, the Leader of the Opposition in the Lok Sabha (or the leader of the largest opposition party in terms of numerical strength), and the CJI. It is significant to

⁵⁹ (1998) 1 SCC 226

⁶⁰ (1997) 6 SCC 241

⁶¹ (1993) 4 SCC 441

note that the Court's direction was expressly made subject to any law that Parliament may enact.

- 51.** This Court, however, declined to extend, by a judicial fiat, the same protection against removal to the ECs as available to the CEC under the first proviso to Article 324(5). Following the view expressed in ***T.N. Seshan v. Union of India***⁶², it was held that the constitutional text did not permit such parity to be read into the provision. At the same time, considering the importance of institutional independence in a multi-member Commission, it was strongly recommended that the Parliament may consider conferring similar safeguards upon the ECs and protect their conditions of service from adverse variation after appointment.
- 52.** Hon'ble Ajay Rastogi, J. (as His Lordship then was) while concurring with the majority on the appointment process, dissented on the aforesaid aspect and favoured extending such protection to the ECs until a law is made.
- 53.** The prayer for an independent Secretariat and for charging the expenditure of the ECI upon the Consolidated Fund of India was not granted, on the reasoning that such matters lie within the legislative and policy domain. Nevertheless, the Court emphasised the desirability of such measures and urged the Union of India and the Parliament to consider appropriate reforms to further strengthen the institutional independence of the ECI.

⁶² (1995) 4 SCC 611

54. The decision in ***Anoop Baranwal*** (supra), in this Court's opinion, is a classic example of judicial statesmanship, exemplifying the concept of judicial restraint by intervening to fill the vacuum but, with due deference to the Constitutional feature of separation of powers, refraining from embarking on judicial legislation. The Constitution Bench brought the curtains down on the seven decade old legislative inertia, bordering on tyranny of the (elected) majority, in not enacting a law which the Constitution expressly and mandatorily required, and the prevailing executive dominance of keeping appointments of the CEC and the ECs in its hands, by delivering two major and significant outcomes while at the same time insulating itself from the charge of law-making. To put it plainly, the Court after highlighting the constitutional mandate in Article 324(2) of the Constitution and having noticed that Parliament had not made any such law which clause (2) envisaged, despite lapse of 73 years since the Constitution came into force, mandated a *pro tem* three-member Selection Committee (consisting of the Prime Minister, the Leader of Opposition and the CJI) to select the CEC and the ECs; and, then it proceeded to expressly and cleanly observe that such arrangement would be temporary, that is, to hold the field until the Parliament acting in exercise of power conferred on it by clause (2) of Article 324, enacts a law providing for appointment of such commissioners. The Constitution Bench, if one reads the judgment carefully, indicated a mechanism to be evolved; it did not specify one to be followed to the tee. What the Hon'ble Judges comprising the

Constitution Bench in **Anoop Baranwal** (supra) intended, in effect, was a deliberate signalling advice, and not a mandate. The same can be better encapsulated through the passage extracted hereinbelow:

311.1. 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.

(emphasis added)

- 55.** Furthermore, illumining the said position, the phrase '*we make it clear that this*' [referring to the norms laid down in para. 315 of **Anoop Baranwal** (supra)] settles the dust, if any, as to the intention of the learned Judges, while enunciating the principles therein.
- 56.** In the Court's *pro tem* mechanism, one would find reflection of judicial pragmatism tempered by deference to separation of powers. The Court avoided, for good reasons, permanent judicial legislation, while still securing a constitutional balance. To safeguard independence, it included the CJI as a neutral arbiter; and to secure legitimacy, by keeping it within the political process, included the Prime Minister and the Leader of Opposition by ensuring their participation. If the Constitution Bench were to rule that the three-member Selection Committee is the final composition of selectors to select the CEC and the ECs, it would have effectively amended clause (2) by deleting the words "subject to the provisions of any law" and thereby re-written the Constitution itself. Seemingly alive to the *Laxman Rekha* of restraint to

be exercised in matters of judicial legislation, the Constitution Bench consciously did not step into territory reserved by the Constitution for the Parliament, thereby avoiding a possible transgression of law. This Court, in **Anoop Baranwal** (supra) and in other significant judicial pronouncements, has been more than cautious of the judicial constraints within which it operates. This judicial restraint stands amplified when it comes to matters of executive and legislative balance, particularly in cases of elections. The last and perhaps the only time this Court had grappled with a topic as sensitive as elections, it caused — unknowingly — an avalanche called the National Emergency. That the Constitution Bench while deciding **Anoop Baranwal** (supra) had trodden the path with extreme caution, bears testimony to the apprehension.

57. While making the arrangement purely transient and requiring the Parliament to frame a law on the lines of Article 324, the Constitution Bench provided the rationale for the course it chose to adopt. It acknowledged that independence of the ECI was part of the basic structure and, hence, the need for an arrangement arose to fill up the vacuum caused by absence of law. Thus, instead of a constitutional norm, the Court provided an interim arrangement.
58. Nudged by the decision of this Court, the Parliament activated itself and enacted the 2023 Act. According to the challengers, the new enactment, which has been the immediate legislative counter response to **Anoop**

Baranwal (supra), has ensured that the check is removed and the executive dominance restored and maintained.

- 59.** As it stands today, the 2023 Act is within the constitutional text and cannot be challenged on the ground of legislative incompetence. Indeed, it is not the case of the challengers either that the 2023 Act suffers from legislative incompetence. However, the 2023 Act is challenged in a few of the petitions on the ground of removal of the CJI from the body of selectors⁶³ and in the others, it is specifically challenged on the ground of lack of an independent selector which, it is claimed, has the effect of breaching the independence of the ECI. They further complain, what was abhorred by the Constitution Bench in so many words in its decision in **Anoop Baranwal** (supra) has returned as a sequel with the 2023 Act where the political executive is empowered by the Parliament to call the shots.
- 60.** The argument of the challengers has been that the 2023 Act dilutes the independence of the ECI and thereby violates the basic structure doctrine. Therefore, in the light thereof, the question of constitutional validity of Section 7 of the 2023 Act appears at the forefront, which is to be tested from the angle of the basic structure doctrine as well as on the anvil of Articles 14 and 324 and this ought to arise at the time the 2023 Act is examined on its merits, and not at this juncture.
- 61.** Reading **Anoop Baranwal** (supra), it does appear to have been the concern of the Constitution Bench that a vacuum had existed for seven

⁶³ W.P. (C) No. 11 of 2024 and W.P. (C) No. 13 of 2024

decades resulting in a constitutional failure on the part of the Parliament, which was sought to be constitutionally remedied by this Court, as was the case in **Vishaka** (supra) and **Prakash Singh** (supra). There can be no doubt that the guidelines set by the Constitution Bench in **Anoop Baranwal** (supra) were to remain in force till the enactment of a law by the Parliament under Article 324; once the Parliament enacts the law, the interim directions would cease to operate. By enacting the 2023 Act, the Parliament has exercised the power the Constitution reserved for it. A judicial interim arrangement has, thus, been replaced by a legislative rule.

62. Learned Attorney and the learned Solicitor have painstakingly argued that the norms set in **Anoop Baranwal** (supra) were not such that the Parliament could not have legislated differently. They assert that if such submission is not accepted, it would mean that the Court, and not the Parliament, has the final say on policy, even though the mandate of the Constitution is “subject to law made by Parliament”. Undoubtedly, this argument (restricted to its point) has considerable, *prima facie*, merit *qua* the writ petitions which claim that the CJI should have been one of the selectors.

63. This Court’s understanding of **Anoop Baranwal** (supra), thus, points to this direction: the Constitution Bench, in its decision spread in excess of 300 paragraphs, was seeking to legitimise the *pro tem* arrangement and invited the Parliament to legislate based on a reasoned blue print which the Parliament could accept, reject or modify. The detailed

reasoning in **Anoop Baranwal** (supra) explains why independence demands a neutral appointment mechanism but the very language the Constitution Bench used makes it explicit that it was transient in nature and not a binding norm that Parliament was constitutionally obliged to follow. If, indeed, the Constitution Bench intended that inclusion of the CJI in the Selection Committee were binding on the Parliament, it would have said so but at the risk of being legislatively overruled.

- 64.** What follows from a reading of **Anoop Baranwal** (supra) is that the declaration of independence of the ECI being integral to free and fair elections and that the process has to be independent of exclusive executive control, is binding on all courts and, in no unclear terms, animates how Article 324(2) is to be interpreted by the constitutional courts. However, constitution of the *pro tem* committee as an interim arrangement has to be seen as an exercise of this Court's power under Article 142 of the Constitution as a *pro tem* measure. Once the 2023 Act was enacted, the interim arrangement of including the CJI in the process of selection of the CEC and the ECs worked itself out.
- 65.** Thus, *prima facie*, the argument of the challengers that the Parliament ignored a judicial norm it was meant to follow, may not be correct.
- 66.** Moving ahead, with the enactment of the 2023 Act, the question now is whether the appointment process contemplated by Sections 7, 6 and 8(2), evinces a major executive control, passes the muster of Article 14, and whether, Section 7 in particular, meets the constitutional

standard of independence required by Article 324 and the basic structure.

67. In *People's Union for Civil Liberties* (supra), while holding that a voter has a right not to vote for any of the contesting candidates, this Court observed that democracy and free elections are a part of the basic structure of the Constitution and also that opinions are not divided on free and fair elections alone guaranteeing the growth of a healthy democracy in the country. For democracy to survive, it is fundamental that the best available individuals should be chosen as the people's representatives for the proper governance of the country and the same can be best achieved through persons of high moral and ethical values who win the elections on a positive vote. Emphasising on a vibrant democracy, the Court observed that the voter must be given an opportunity to choose none of the above (NOTA) button, which would indeed compel the political parties to nominate a sound candidate. Accordingly, the principle of the dire need of negative voting was emphasised. The significance of free and fair elections, and the necessity of the electorate to have candidates of high moral and ethical values was reasserted.

68. The challengers assert that it is vital for democracy to have persons of high moral and ethical calibre contest the elections; however, that *per se* is not enough. A free and fair election presupposes a host of prior institutional safeguards. That onerous duty, if entrusted to the CEC and the ECs who are not independent and neutral but owe allegiance

elsewhere, and are appointed through a process that does not assure independence and neutrality, must fail the constitutional test.

- 69.** On the question of independence and neutrality, this is what is understood of what the challengers have argued. They have articulated explicitly only so much as is prudent, leaving the rest to implicit suggestions. The 2023 Act envisages a Selection Committee of three. Out of the three, the Prime Minister and the Leader of Opposition walk in as members thereof by dint of the office they hold. Had it been a Selection Committee of two of them, a stalemate would have been inevitable, particularly, in present times, when parliamentary sessions facing regular disruptions remain inconclusive by reason of repeated adjournments. The hint was to search archived records to find out when the Parliament for the last time, without any disruption at all, conducted meaningful sessions. In any event, in unison, it has been contended that it is the Minister's inclusion in the committee which is the subject matter of serious concern and, according to the challengers, denudes the Selection Committee of institutional neutrality. They contend, and not without valid reason, that the Prime Minister's nominee can never be expected to oppose the Prime Minister and take the side of the Leader of Opposition; and, if the said Selection Committee were to function, the decision would invariably be 2:1, on paper, in favour of the executive and, in practice, of whoever is the ruling party. With two members from the executive being part of the Selection Committee, the executive has an effective veto. That veto is what Dr. Ambedkar stood

against and disapproved in no uncertain terms *albeit* in course of a non-formal address, noted above. Significantly, when queried by this Court as to whether the Prime Minister's nominee would take a stand against the Prime Minister in case of a difference of opinion between the Prime Minister and the Leader of Opposition, "probably no" was the answer of the learned Attorney although "certainly no" is what the challengers say would be the ultimate outcome.

70. The presence of likelihood of a 'no' is striking enough to colour the perception of the Selection Committee; the probabilities and certainties of the 'no' matter little. Thus, the challengers of the law contend, even if the appointments are meritorious, the process does not pass the perception test. The bottom line of the argument runs thus: it would not be a fallacious metaphor if it is said that since the umpire is picked by the captain of one side in a cricket match and his team wins, even if the decisions taken by such umpire are correct, it has the patina of suspicion, for, at the end of the day, the umpire has effectively been chosen by the winning captain.

71. These are very emphatic and appealing submissions. If free and fair elections are to be ensured, it is axiomatic that the ECI must not only be an independent body but also be seen to act independently. Though the 2023 Act may possibly survive the frontal challenge of not including the CJI in the selection committee, it also has to succeed on the perception test which this Court has repeatedly said is essential. Can it be argued with conviction that the selection committee envisioned in

Section 7 looks as independent as the *pro tem* committee that **Anoop Baranwal** (supra) suggested? Is the mechanism constitutionally credible? It cannot be assumed that the incumbents appointed or to be appointed under the 2023 Act would not be individuals of character and integrity, or, who do not value their independence, or, that the working of the 2023 Act would result only in a subservient CEC and ECs being appointed; nonetheless, does the mechanism generate the same public confidence that presence of a neutral third member would?

- 72.** While this Court does not express any conclusive response to the questions posed above since they deal with the legitimacy of the 2023 Act, some *prima facie* observations would be necessary in the present context. There can be no gainsaying that free and fair elections, to a large extent, depend on a truly independent ECI. It is not enough for the ECI to be independent, it must also appear to be independent. The Minister nominated by the Prime Minister, to function as the third member on the Selection Committee chaired by the Prime Minister, cannot be expected to defy his own nominator and risk his continuation as such nominated member on the committee, for all practical purposes. Even otherwise, the collective responsibility doctrine would preclude the Minister to oppose his Prime Minister. As observed in **Manoj Narula** (supra), the Constitution reposes faith in the Prime Minister; and the entire nation has expectations of good governance being carried on by the Ministers of his choice. Since it is the Council of Ministers who has the collective responsibility to sustain the integrity and purity of the

constitutional structure, it is far-fetched to expect that a Minister, who is part of the Council of Ministers and bound by the collective responsibility under Article 75(3), would adopt a stand in the matter of appointment to a sensitive constitutional office disagreeing with the leader of the Government. In such a circumstance, the inclusion of a Cabinet Minister in the Selection Committee fails to provide the independent counterweight that a neutral selector could and he (Cabinet Minister) would merely echo the voice of his leader; and, consequently, the presence of the Leader of Opposition in the Selection Committee becomes largely ornamental, without furthering the purpose of his inclusion. The point urged by the challengers that since the 2023 Act vests overwhelming selection power in the executive and thereby undermines the appearance of independence essential to Article 324 and the basic structure, *prima facie*, does appear to have substance.

- 73.** Learned Solicitor stressed on the sacred constitutional trust that is attached to the office of the Prime Minister to drive home the point that decisions taken by the Prime Minister at the helm are not to be doubted.
- 74.** The misfortune of the people of India is that, the lofty ideals that the Constitution envisaged have remained largely unaccomplished owing to a lack of intent and non-abidance with constitutional morality by the ruling regime, past and present, resulting in substantial institutional erosion. It is disheartening to note that year on year, instead of promoting persons who have spotless track records and are known to be persons of unimpeachable integrity and rectitude, the political

parties appear keen, instead, to promote individuals who have been accused of various crimes, including even moral turpitude. That a large number of parliamentarians, legislators and even ministers, both at the Centre and in the States, have criminal antecedents is a fact borne out by data in the public domain. Though one must also remain alive to the fact that false cases are instituted in large numbers against public figures only to malign them, yet, the figures as they are and if the same are to be believed, it is a matter of grave concern for the nation.

- 75.** Be that as it may, the figures are also suggestive that even the leadership of political parties finds itself unable to rise above narrow partisan interests and commit to cleansing public life. In such a situation, one is forced to ask whether the constitutional trust reposed by Dr. Ambedkar during the CA Debates and this Court in ***Manoj Narula*** (supra) has been betrayed in practice?
- 76.** Thus, any reference made to the constitutional trust doctrine, having regard to the criminal background of members of the elected bodies, must extend to the constitutional morality of the appointing process itself.
- 77.** Having expressed a purely *prima facie* view based on the detailed analysis made above, without which no valid opinion can be rendered as to whether these petitions should be referred, as claimed by the defenders, it is time to deal with their objection. Mindful, as this Court is, of what Article 145(3) of the Constitution and Order XXXVIII of the

SCR ordain, the broad question that emerges for this Court's opinion is rendered hereafter.

- 78.** Amidst all the vast legislative landscape which derive their legitimacy from the Constitution of India (being the supreme law of the nation), if any one subject of enactment is to be bestowed with the pride of place in our Constitutional scheme, it is undoubtedly the election laws of the country. Articles 324 to 329 constitute a self-contained code for superintendence, conduct and adjudications of elections, and Article 327 and 328 expressly contemplate laws made by the Parliament and the Legislatures to give effect to that code. The Representation of the People Act, 1951⁶⁴ establishes the legal framework for conducting elections, ensuring that every citizen has a fair and equal opportunity to exercise his right to vote and participate in the political process, and regulates the qualifications and disqualifications of candidates, delimiting constituencies, and overseeing the electoral machinery, while the 2023 Act establishes the legal framework for constituting the very machinery itself, prescribing who shall be entrusted with the conduct of those elections. The 2023 Act and the RoP Act are not ordinary statutes; they are laws traceable directly to Articles 324(2) and 327 and give flesh and blood to the basic skeletal structure of democracy itself. If a hierarchy were attempted within the corpus of statute law, laws enacted under Part XV of the Constitution, to this Court's mind, would rank immediately below the Constitution, for, they are the laws that play a

⁶⁴ RoP Act

significant role in reinforcing the rule of law and in upholding the principles of justice, fairness and transparency in electoral processes, and through which the Government constitutes itself anew at every election.

79. The question, therefore, is not one whether the present challenge invokes constitutional provisions of considerable significance. It emphatically does! But, the more germane inquiry, for the extant purpose of reference under Article 145(3), is whether the challenge raises a *substantial question of law as to the interpretation of the Constitution* which remains unsettled (emphasis added) and the determination of which is necessary for disposal of the *lis*? The constitutional character of the controversy, *per se*, cannot be the determinative test. This distinction entails some consequence.

80. In ***Thakur Ganga Singh*** (supra), this Court had the occasion to explain that a question of constitutional interpretation emanates where competing constructions of a constitutional provision are canvassed. Where, however, the governing principle has already been authoritatively settled, what remains is no more than the application of the settled principle to the facts of the case. Such application, by itself, does not transmute the controversy into one of constitutional interpretation. The relevant passage may be profitably extracted hereinbelow:

7. What does interpretation of a provision mean? Interpretation is the method by which the true sense or the meaning of the word is understood. The question of interpretation can arise only if two or more possible

constructions are sought to be placed on a provision - one party suggesting one construction and the other a different one. But where the parties agree on the true interpretation of a provision or do not raise any question in respect thereof, it is not possible to hold that the case involves any question of law as to the interpretation of the Constitution. On an interpretation of Art. 14, a series of decisions of this Court evolved the doctrine of classification. As we have pointed out, at no stage of the proceedings either the correctness of the interpretation of Art. 14 or the principles governing the doctrine of classification have been questioned by either of the parties. Indeed accepting the said doctrine, the appellants contended that there was a valid classification under the rule while the respondents argued contra. The learned Additional Solicitor General contended, for the first time, before us that the appeal raised a new facet of the doctrine of equality, namely, whether an artificial person and a natural person have equal attributes within the meaning of the equality clause, and, therefore, the case involves a question of interpretation of the Constitution. This argument, if we may say so, involves the same contention in a different garb. If analysed, the argument only comes to this: as an artificial person and a natural person have different attributes, the classification made between them is valid. This argument does not suggest a new interpretation of Art. 14 of the Constitution, but only attempts to bring the rule within the doctrine of classification. We, therefore, hold that the question raised in this case does not involve any question of law as to the interpretation of the Constitution. (emphasis added)

81. This position was further illumined by a 3-Judge Bench in ***People's Union for Civil Liberties*** (supra) as follows:

29. In our view, this contention is totally misconceived. Article 19(1)(a) is interpreted in numerous judgments rendered by this Court. After considering various decisions and following tests laid therein, this Court in *Assn. for Democratic Reforms* [**Ed.**: See full text at 2003 Current Central Legislation, Pt. II, at p. 3] arrived at the conclusion that for survival of the democracy, right of the voter to know antecedents of a candidate would be part and parcel of his fundamental right. It would be the basis for free and fair election which is a basic structure of the Constitution. Therefore, the question relating to interpretation of Article 19(1)(a) is concluded and there is no other question which requires interpretation of the Constitution.

32. From the judgment rendered by this Court in *Assn. for Democratic Reforms* [**Ed.**: See full text at 2003 Current Central Legislation, Pt. II, at p. 3] it is apparent that no such contention was raised by the learned Solicitor-General, who appeared in appeal filed on behalf of the Union of India that question involved in that matter was required to be decided by a five-Judge Bench, as provided under Article 145(3) of the Constitution. The question raised before us has been finally decided and no other substantial question of law regarding the interpretation of the Constitution survives. Hence, the matter is not required to be referred to a five-Judge Bench.

(emphasis added)

- 82.** The significance of this Court's decision in ***People's Union for Civil Liberties*** (supra), therefore, lies not merely in its conclusion, but in the principle underlying it: merely invoking a constitutional provision does not raise a substantial question of law as to interpretation of the Constitution if the governing principle has already been settled by this Court. Once a constitutional rule stands authoritatively declared, its application to a new statutory or factual context may often be required; but that alone does not furnish a valid basis for a reference to a larger Bench.
- 83.** This position bears of no ambiguity in ***Abdul Rahim Ismail C. Rahimtola*** (supra). The contention before this Court in such case was that since a constitutional question had been raised, the same had to be referred to a Bench of not less than 5 (five) judges as stipulated in Article 145(3). The said submission was rejected on the anvil that the very question sought to be raised had already been settled by a 5-Judge Bench and, hence, no substantial question as to the interpretation of the Constitution subsisted. The Court reasoned in the following words:

6. As to the first contention it was urged that Section 3 of the Act and Rule 3 of the Rules insofar as they purported to relate to an Indian citizen were ultra vires the Constitution, as they offended against the provisions of Article 19(1)(d) and (e). Article 19(1)(d) confers the fundamental right on all Indian citizens "to move freely throughout the territory of India" and Article 19(1)(e) "to reside and settle in any part of the territory of India". This fundamental right, however, is subject to reasonable restrictions under clause (5) of Article 19. In the case of *Ebrahim Vazir Mavat v. State of Bombay* [(1954) SCR 933] the majority judgment of this Court held that an Indian citizen visiting Pakistan for any purpose whatsoever and returning to India may be required to produce a permit or a passport as the case may be before he can be allowed to enter India, and this requirement may well be regarded as a proper restriction upon entry. This Court, however, held that it was quite a different matter to say that if he enters India without a

permit he may on conviction for such offence be ordered to be removed from India. It was the order directing his removal from India which was held by this Court to be tantamount to taking away his fundamental right guaranteed under Article 19(1)(e), "to reside and settle in any part of the territory of India". It is clear, therefore, that so far as this Court is concerned it has already decided that to require an Indian citizen to produce a passport before he can be allowed to enter India may be regarded as a proper restriction upon entering India. This decision is binding on us and we must follow the decision of this Court in the case referred to. It was, however, urged that as a constitutional question has been raised this matter cannot be decided by Judges less than five in number. Therefore, the case should be referred to what is described as the Constitution Bench. Article 145(3) of the Constitution states that the minimum number of Judges who are to sit for the purpose of deciding any case involving a substantial question of law as to the interpretation of the Constitution or for the purpose of hearing any reference under Article 143 shall be five. It is clear that no substantial question of law as to the interpretation of the Constitution arises in the present case as the very question raised has been decided by a Bench of this Court consisting of five Judges. As the question raised before us has been already decided by this Court it cannot be said that any substantial question of law arises regarding the interpretation of the Constitution.

(emphasis added)

84. A similar sentiment was echoed by this Court, more recently, in

Shrimanth Balasaheb Patil (supra) as follows:

157. There is no doubt that the requirements under Article 145(3) of the Constitution have never been dealt with extensively and, more often than not, have received mere lip service, wherein this Court has found existence of case laws which have already dealt with the proposition involved, and have rejected such references. Normatively, this trend requires consideration in appropriate cases, to ensure that unmeritorious references do not unnecessarily consume precious judicial time in the Supreme Court.

158. In any case, we feel that there is a requirement to provide a preliminary analysis with respect to the interpretation of this provision. In this context, we need to keep in mind two important phrases occurring in Article 145(3) of the Constitution, which are, "substantial question of law" and "interpretation of the Constitution". By reading the aforesaid provision, two conditions can be culled out before a reference is made:

(i) The Court is satisfied that the case involves a substantial question of law as to the interpretation of this Constitution;

(ii) The determination of which is necessary for the disposal of the case.

159. We may state that we are not persuaded for referring the present case to a larger Bench as the mandate of the aforesaid Article is that this Court needs to be satisfied as to the existence of a substantial question of law on the constitutional interpretation. However, this does not mean that every case of constitutional interpretation should be compulsorily referred to a Constitutional Bench.

160. Any question of law of general importance arising incidentally, or any ancillary question of law having no significance to the final outcome, cannot be considered as a substantial question of law. The existence of substantial question of law does not weigh on the stakes involved in the case, rather, it depends on the impact the question of law will have on the final determination. If the questions having a determining effect on the final outcome have already been decided by a conclusive authority, then such questions cannot be called as "substantial questions of law". In any case, no substantial question of law exists in the present matter, which needs reference to a larger Bench. The cardinal need is to achieve a judicial balance between the crucial obligation to render justice and the compelling necessity of avoiding prolongation of any lis.

(emphasis added)

- 85.** Having surveyed the precedents, germane for the present remit of consideration, solely as to whether the present matter warrants a reference to a larger Bench, the submission seeking a reference merely because the constitutional principles invoked by the challengers are of foundational significance, does not, carry the matter any further. The Court is required to identify the precise proposition of constitutional law which remains open for determination and which, despite the extant body of binding precedents, calls for reconsideration by a larger Bench.
- 86.** The present case involves propositions relating to the constitutional imperative of free and fair elections and the necessity of the institutional independence of the ECI. The constitutional conspectus of Article 324 cannot be examined in silos, *de hors* the binding principles enunciated in the precedents. The 2023 Act undoubtedly adds a new element to the canvas that must be tested against the settled principles occupying the field thus far. Such an exercise, however, is materially different from saying that the constitutional principles themselves remain unsettled. The former is an *application of settled constitutional standards to a*

subsequent legislative measure; the latter alone would warrant a reference to a larger Bench. The two ought not to be conflated.

87. It is against this backdrop that the prayer for reference must be examined. The issue does not hinge upon whether the independence of the ECI is a part of basic structure or not. It plainly is! But does the existing jurisprudence leave amorphous a substantial question concerning the constitutional standard governing such independence? If the answer to the aforesaid is in the negative, the *lis* must be answered within the milieu of settled law, including by examining whether the statutory scheme introduced by the 2023 Act complies with the constitutional requirements as dictated by this Court.

88. In the further considered opinion of this Court, the justification for a reference cannot be sustained merely by repackaging an existing constitutional principle in a seemingly new factual or legislative setting. Hence, this Court holds as under:

A. The *prima facie* opinion expressed hereinabove is confined to consideration of the prayer for a reference and does not entail any expression *qua* the merits of the final challenge laid in the petitions before this Court.

B. Precedents having laid down in unmistakable terms that free and fair elections are a basic feature of the Constitution and that the ECI should be insulated from exclusive executive control in relation to appointments of the CEC and the ECs, what remains is no more than

the application of the settled principles of law to the facts of the case and a decision on the challenge, as laid.

C. Thus, neither any constitutional bar nor a precedent precludes hearing of these petitions by the present Bench.

D. Accordingly, the defenders' prayer for a reference to a larger Bench is rejected for the foregoing reasons.

89. The writ petitions and the intervention applications may, therefore, be placed for hearing on a date to be notified later, subject to obtaining an order in that behalf from the CJI.

.....J.
(DIPANKAR DATTA)

**NEW DELHI;
SEPTEMBER 23, 2026.**

REPORTABLE

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

WRIT PETITION (CIVIL) NO. 14 OF 2024

DR. JAYA THAKUR & ORS. ...PETITIONERS

VERSUS

UNION OF INDIA & ANR. ...RESPONDENT(S)

WITH

WRIT PETITION (CIVIL) NO. 13 OF 2024

GOPAL SINGH **...PETITIONER**

VERSUS

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WRIT PETITION (CIVIL) NO. 11 OF 2024

NAMAN SHRESTHA & ANR. ...PETITIONERS

VERSUS

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WITH

WRIT PETITION (CIVIL) NO. 87 OF 2024

**ASSOCIATION FOR
DEMOCRATIC REFORMS**

...PETITIONER

VERSUS

UNION OF INDIA

...RESPONDENT

WITH

WRIT PETITION (CIVIL) NO. 191 OF 2024

**PEOPLES UNION FOR CIVIL
LIBERTIES & ANR.**

...PETITIONERS

VERSUS

UNION OF INDIA

...RESPONDENT

WITH

WRIT PETITION (CIVIL) NO. 272 OF 2024

**LOK PRAHARI THROUGH ITS
GENERAL SECRETARY S.N. SHUKLA** ...PETITIONER

VERSUS

UNION OF INDIA & ORS.

...RESPONDENT(S)

OPINION

SATISH CHANDRA SHARMA, J.

1. I have read the judgment proposed to be delivered by my learned brother, Justice Dipankar Datta, over and over again. With the deepest of respect that I have for His Lordship and with utmost humility, I am unable to persuade myself to accept all the observations made or the line of reasoning adopted by His Lordship to hold that the issues arising in this batch of writ petitions and the connected intervention applications do not deserve consideration by a Constitution Bench. Thus, I propose to write a brief opinion in support of my views.

2. The facts giving rise to the writ petitions, the defence taken by the respondents, the arguments of the parties and the issues arising for decision have been noted in detail by His Lordship; hence, I need not repeat the same.

3. The petitioners have relied on the decisions of this Court in *State of J & K v. Thakur Ganga Singh*¹; *Abdul Rahim Ismail C. Rahimtoola v. State of Bombay*²; *People's Union for Civil Liberties v. Union of India*³, and *Shrimanth Balasaheb Patil v.*

¹ AIR 1960 SC 356

² 1959 SCC OnLine SC 60

³ (2003) 4 SCC 399

*Karnataka Legislative Assembly*⁴ to urge that a reference need not be warranted if the issue for decision has already been resolved. Next, they have relied on the decision in *Madras Bar Association v. Union of India*⁵ to contend that no request for a reference belatedly made should be accepted. Further, the decisions in *Shreya Singhal v. Union of India*⁶; *Nikesh Tarachand Shah v. Union of India*⁷; *NALSA v. Union of India*⁸; *Anuj Garg v. Hotel Association of India*⁹; *Subramanian Swamy v. Union of India*¹⁰; *State of Maharashtra Vs. Indian Hotel & Restaurants Assn.*¹¹; *Lily Thomas v. Union of India*¹²; *D.K. Basu v. State of West Bengal*¹³; *Nandini Sundar v. State of Chhattisgarh*¹⁴; *Independent Thought v. Union of India*¹⁵; *Pattali Makkal Katchi v. A. Mayilerumperumal*¹⁶ and *Union of India v. Rajendera N. Shah*¹⁷ were relied on to contend that constitutional challenges have been decided by smaller Benches and the mere fact that constitutional validity is in issue does not warrant a reference to a Constitution Bench. Finally, reliance

⁴ (2020) 2 SCC 595

⁵ (2026) 2 SCC 1

⁶ (2015) 5 SCC 1

⁷ (2018) 11 SCC 1

⁸ (2014) 5 SCC 438

⁹ (2008) 3 SCC 1

¹⁰ (2016) 7 SCC 221

¹¹ (2013) 8 SCC 519

¹² (2013) 7 SCC 653

¹³ (1997) 1 SCC 416

¹⁴ (2011) 7 SCC 547

¹⁵ (2017) 10 SCC 800

¹⁶ (2023) 7 SCC 481

¹⁷ (2022) 19 SCC 520

was placed on *Rao Shiva Bahadur Singh v. State of Vindhya Pradesh*¹⁸, which I propose to deal at a later stage.

4. The respondents have referred to Article 145(3) of the Constitution of India, 1950 and Order 38 of the Supreme Court Rules, 2013 to support their contention that challenge to the provisions of the Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023 (hereafter the said Act) being a matter of constitutional significance and raising substantial questions of law as to interpretation of the Constitution, these matters must be heard by a Constitution Bench of not less than 5 Judges.

5. In my opinion, the arguments advanced on behalf of the respondents by Mr. Venkataramani, learned Attorney General for India and Mr. Mehta, learned Solicitor General are well-founded. The said Act has been recently enacted pursuant to the decision of the Constitution Bench in *Anoop Baranwal v. Union of India*¹⁹. There is no authoritative decision of this Court till date pronouncing on the constitutional validity of the said Act. A judicial decision in light of what the Constitution provides has to be given by this Court while it is seized of the issue of *vires* of Section 7 of the said Act and its other provisions. The decision

¹⁸ (1955) 1 SCC 539

¹⁹ (2023) 6 SCC 161

on these writ petitions would be the first of its kind and it is all the more necessary that a reference is made.

6. In my opinion, the learned Solicitor General essentially advanced his constitutional submissions in support of his prayer for reference of the matter to a larger Bench of five Judges. While addressing the said prayer for reference to a Constitution Bench, he placed reliance upon the doctrine of separation of powers amongst the three organs of the State under the Constitution.

7. In this context, the learned Solicitor General relied upon the judgment of a Constitution Bench of this Hon'ble Court in the NJAC case, wherein the Court had held that the presence of even the Law Minister in the Collegium for the selection of Judges of the High Courts and the Supreme Court was violative of the doctrine of separation of powers. Building upon the aforesaid constitutional principle, the submission of the learned Solicitor General was that a corresponding degree of constitutional independence must also be recognized for the Executive as well as the Legislature. He submitted that the Committee constituted under the Rules framed under Article 324 deserves to be declared legal though dominated by the members of the executive. The submission was not as a criticism of the Collegium system or regarding the role of the executive in the appointment of Judges. In my opinion, it was a submission to the

effect that if the Constitution Bench has held that the presence of outsiders in the collegium as violative of doctrine of separation of powers, a similar independence should be read in the executive also and the rules framed under Article 324 be not declared void on the ground either that it does not have any outsider in the Committee of selection or there is pre-dominance of only executive in the committee of selection.

8. In my perspective, it was neither a criticism of the Collegium system nor initiating any debate regarding the manner in which the system of selection has worked. The submission was confined to the aforesaid constitutional principle and its application to the issue arising in the present case. In my humble opinion, as there is no authoritative decision of this Court till date pronouncing upon the constitutional validity of the said Act, the matter must be heard by a Constitution Bench of not less than five Judges.

9. Let me now briefly deal with the contentions of the petitioners urging us not to refer the issue(s) to a larger Bench.

10. The petitioners' primary contention was that the Constitution Bench in *Anoop Baranwal* (supra) not only addressed the constitutional vacuum under Article 324(2) but also held that the Election Commission of India must be insulated from exclusive executive control in appointments. The present

case only requires application of that settled principle to the said Act.

11. Also, it was contended that even independent of *Anoop Baranwal* (supra), placing the appointment of the Election Commissioners substantially under executive control compromises the constitutional balance, particularly because the executive itself is a participant in the process.

12. Having read the decision in *Anoop Baranwal* (supra), my understanding is that it was dealing with the constitutional vacuum and noticing that no law had been enacted and while leaving it to the Parliament to enact the law, the Constitution Bench proposed an *ad hoc* arrangement whereby the Hon'ble the Prime Minister, the Hon'ble Chief Justice and the Leader of the Opposition were to form an interim committee to select the Election Commissioners. No doubt, to the extent law has been declared under Article 141 is to be applied but whether or not Parliament was justified in not including a neutral selector in the selection committee is an important question arising for the first time before this Court. Since, it is a substantial question of law as to interpretation of the Constitution, which has not been dealt with in any precedent, the plain language of Article 145(3) read with Order 38 of the Supreme Court Rules does not leave any room for a decision on such question finally by the present combination.

13. The next contention was that reference to a Constitution Bench must not be made merely because legislation is novel or constitutional in character, because, if every challenge to a new statute enacted under a constitutional provision were referred under Article 145(3) of the Constitution, the constitutional threshold would become meaningless. In this regard, it was also contended that a reference does not depend on novelty and it is the substance of the statute that matters.

14. My view on this contention is this. Old or new, whatever be the character of the statute, if validity of such statute or a part thereof is questioned on valid grounds as failing the constitutional test and if this Court has previously not had the occasion to deal with and pronounce on such grounds, a reference would seem to be in order. This contention of the petitioners militates against the mandatory provisions of Article 145(3) of the Constitution read with Order 38 of the Supreme Court Rules and, hence, has failed to impress me.

15. Further contention, raised with substantial force by placing heavy reliance on *Madras Bar Association* (supra), is the belated plea for reference under Article 145(3) of the Constitution though such plea was neither raised in the counter-affidavit nor at the inception of hearing particularly during all these two years when the petitions have remained pending. A belated approach may not be welcome but one cannot be oblivious of the several

previous decisions of this Court on the same subject of reform of tribunal laws, culminating in the challenge raised to the current tribunal reform laws in *Madras Bar Association* (supra). It is in such type of cases, where nothing further remains to be decided on merits except reviewing the purported disobedience of this Court's earlier decisions by those entrusted with implementation, that a Constitution Bench need not be convened over again on the same issue.

16. Attention was drawn to several decisions where this Court decided constitutional challenges sitting in a combination of 2/3 Judges and it was contended that the mere fact of constitutional validity being in issue did not appeal to the relevant Benches to make a reference to a Constitution Bench. I would answer this contention by reverting to the contents of paragraphs 12 and 14 above, for the sake of brevity.

17. Contention raised that the said Act effectively seeks to legislatively overrule *Anoop Baranwal* (supra), which is impermissible, is again unmeritorious because of the nature of exercise performed by the Constitution Bench. Had it not been an interim arrangement, the consequence could have been otherwise.

18. Further, reliance placed on *Rao Shiva Bahadur Singh* (supra) is wholly misplaced. Paragraphs 16 and 17 of the said

decision suggest that even though a reference before a 5-Judge Constitution Bench may be decided by answering the constitutional question, the subsidiary questions may be left for decision by a Bench of lesser strength. The declaration as made does not fit in the fact situation here, since the primary contention of the petitioners to the validity of Sections 7, 6 and 8 of the said Act does raise a substantial question of law as to interpretation of the Constitution, which has not been decided before, and hence should and must be decided by a Constitution Bench now.

19. The submission that reference to a Constitution Bench would permit the respondents to launch a challenge to the decision in *Anoop Baranwal* (supra) and reopen issues settled by it, short-circuiting the reference procedure and, thus, misusing the provisions of Article 145(3) of the Constitution, proceeds on a misapprehension. Fair and free elections being a part of the basic structure has been acknowledged in the precedents relied on and no Court can or would, possibly, doubt it now. But whether the said Act fails the test of free and fair elections has to be independently examined.

20. Having regard to the aforesaid discussion, in my opinion, all the petitions in accordance with Article 145(3) of the Constitution and Order 38 of the Supreme Court Rules may now be placed before the Hon'ble Chief Justice of India for an appropriate order of constitution of a Constitution Bench to

adjudicate the constitutional validity of Sections 7, 6 and 8 of the said Act.

.....J.
[SATISH CHANDRA SHARMA]

NEW DELHI
September 23, 2026.

**IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION**

WRIT PETITION (CIVIL) NO. 14 OF 2024

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**PEOPLE'S UNION FOR CIVIL
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UNION OF INDIA

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WITH

WRIT PETITION (CIVIL) NO. 272 OF 2024

**LOK PRAHARI THROUGH ITS
GENERAL SECRETARY S.N. SHUKLA**

... PETITIONER

VERSUS

UNION OF INDIA AND ORS.

... RESPONDENTS

O R D E R

DIPANKAR DATTA AND SATISH CHANDRA SHARMA, JJ.

1. The present cluster of writ petitions and the interlocutory applications filed therein for intervention were heard extensively for 5 (five) days by us. Speaking in one voice would have better served institutional cohesion. Unfortunately, the Court is divided in its opinion.

2. In view of the difference of opinion between the two of us, ideally, a reference to a 3-Judge Bench is called for. However, having regard to the question on which such difference has arisen, i.e., whether the petitions and the applications should be heard by a Constitution Bench of 5 (five) Judges, a decision by a 3-Judge Bench to resolve which of the two opinions

is correct would be of little worth and only delay adjudication of the significant issue(s) that these writ petitions raise.

3. Thus, we direct that the papers be placed before the Hon'ble the Chief Justice for considering the desirability of constituting a Constitution Bench of such number of Judges to decide the question of *vires* of Section 7 and the other provisions of the Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023.

4. Before parting, we need to notice a concern expressed by the petitioners not on the merits but on the time taken by this Court to decide references. The decision in ***Anoop Baranwal v. Union of India*** reported in (2023) 6 SCC 161 arose out of, *inter alia*, a writ petition under Article 32 presented in 2015. Reference to a Constitution Bench was made by a Bench of two-Judges 3 (three) years later, i.e., in 2018. It took another 5 (five) years, in all 8 (eight) years, for the Bench to give its decision and dispose of the writ petition. Both of us were part of the 9-Judge Bench in ***State of Uttar Pradesh v. Jai Bir Singh*** reported in 2026 INSC 897. It took 9 (nine) years for the reference made by the 7-Judge Bench to travel to the 9-Judge Bench and 5 (five) months more for the Bench to decide. Prior thereto, the reference remained pending for 15 (fifteen) years, since 2002. The petitioners seem to be justified in expressing their anxiety that references to 5-Judge Benches remain unresolved for years together. If statistics are any guide, none can say with any reasonable degree of certainty when long pending references will get resolved. Undisputedly, this is an area of grave concern and the inordinate delay in resolution of the

references is itself a source of institutional embarrassment which all stakeholders ought to strive to avoid. Self-introspection, indeed, is required.

5. We, thus, take this opportunity of requesting the Hon'ble the Chief Justice of India to also explore the necessity of constituting a permanent 5-Judge Bench to decide pure constitutional issues. This is not something novel that we are saying. It has been opined time and again by responsible citizens of the country and we simply endorse their opinion. Given that resolving constitutional issues is the primary task of Judges of this Court, that must remain its core priority. Pendency of references for far too long [any period between 5 (five) and 20 (twenty) years or more] does not reflect well on the institution. It is time that the institution addresses the issue with the urgency and promptitude it deserves.

6. The issues that would engage the consideration of the 5-Judge Bench being of foundational importance to the democratic fabric of the country and its citizenry, we earnestly hope and trust that this reference would not suffer the inordinate delay in its resolution as in other cases.

.....**J.**
(DIPANKAR DATTA)

.....**J.**
(SATISH CHANDRA SHARMA)

**NEW DELHI;
SEPTEMBER 23, 2026.**