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In *T.N. Seshan v. Union of India*, the question for the Court's determination was whether two Election commissioners recently appointed by government could over ride the decisions of the Chief Election Commissioner: whose tenure is constitutionally guaranteed: a contingency which was not envisaged or even contemplated by the framers of Article 324: reduced to basics this is effect of the law recently enacted, by an Ordinance, (on October 1, 1993) amending the Chief Election Commissioner and Election Commissioners (Conditions of Service Act) 1991. This law for the first time introduced a multi-member Election Commission, (for the time being) and declared that its business would be transacted (in the absence of unanimity) by the opinion of the majority of its members. It was this law, as also the validity of the Notification of October 1, 1993, fixing ("until further orders") the number of Election Commissioners at two, and the further Notification of the same date appointing Mr. Gill and Mr. Krishnamurthy as Election Commissioners, that were challenged by Mr. Seshan in the Supreme Court of India. By its interim order passed in November, 1993, a Division Bench of the Court, admitted Mr. Seshan's Writ Petition and directed that till it was finally decided the CEC would remain in complete overall control of the work of the Election Commission, and would not be bound by the views of the newly appointed Election Commissioners: the amending law was virtually stayed. Since then the Election Commission continued to function as a one-man-body until, July 14th, when a Constitution Bench of the Court presided over by the Chief Justice of India announced its final decision. The Amending law of October 1, 1993, and both the Notifications (of the same date) were upheld. Mr. Seshan's Writ Petition was dismissed.

Existing incumbents apart, how independent is the Election commission (as a body) after the judgment? That is what most people want to know. I believe that the answer is that institutionally it is less independent - not because the amending law and the Notifications were upheld. The Court could not have held otherwise since a multi-member Commission can only act, if it is to effectively act at all, either unanimously or by majority. The Election Commission is institutionally less independent than before the judgment because whilst upholding the amendment of October 1, 1993, and the Notifications the Court did not go far enough. If a firm decision had been arrived at by the government to constitute a three-member Commission (Article 324 does not prohibit this) the Court should have enjoined upon the Government

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the obligation of maintaining a multi-member Election Commission as a permanent body; and, in addition, should have imposed on the Government, as a condition to its upholding the validity of the amending law, a further obligation to introduce legislation within a time bound period (by way of amendment to the 1991 Act) guaranteeing to the newly-appointed Election Commissioners irremovability during their respective tenures. In the absence of such a direction it would be open to a future Government to "manipulate" the Commission: if (for instance) it found the current Election Commissioners too independent in outlook and approach it could (with impunity) circumvent their fixity of tenure (six years) by a simple expedient - viz. rescinding the Notification of October 1, 1993, which fixed the number of the Election Commissions at two! Textually that would be permissible, (since the Notification of October 1, fixing the number of Election Commissioners at two is expressed to be "until further orders"). Read on - and you will find that this "simple expedient" has been in fact resorted to by Government before - in the year 1989.

Under Constitution (Article 324) the superintendence, direction and control of the preparation of the electoral rolls and the conduct of all Elections to Parliament and State Legislatures (and of the elections to the Offices of President and Vice President) are vested in the Election Commission, It is to consist of the Chief Election Commissioner and "such number of other Election Commissioners if any, as the President may from time to time fix". (The "President" is a constitutional euphemism for "Central Government"). The independence of the Chief Election Commissioner is secured by the provision that he shall not be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court, and by the further provision that his conditions of services shall not be varied to his disadvantage after his appointment. Election Commissioners were originally conceived of as temporary expedients. Accordingly, the only institutional safeguard for their independence was that they would not be removed from office except on the recommendations of the Chief Election Commissioner. It is respectfully submitted that in declaring that in the decision-making of the multi-member Election Commission, Election Commissioners had equal status with the Chief Election Commissioner, the Court ought to have ensured: (i) that the number of Election Commissioners and their appointments should no longer be left to the sole and unguided discretion of the Central government; (ii) that a multi-member Election Commission of three was mandated by law; and (iii) that Election Commissioners when appointed should have the same assurance of their independence during their tenure (a statutory six year term) as was granted to the holder of the office of the Chief Election Commissioner. Only then, could Election Commissioners claim the right to equal participation in decision making in the business of the Commission. Only then could the public be assured that a multi-member Election Commission is institutionally insulated against all Governmental influence and pressure. But can all this be done by a

Court whilst interpreting constitutional provisions and deciding on the validity of statues and notifications? The answer is: it can. There are precedents but mention of them is superfluous. Some years ago, a shrewd observer of men and matters in this country wrote (quite irreverently) about the nine Justices of his apex Court: that "once in place, they can do what they damn well please!"

In India, the Office of Election Commissioner is a late starter. For almost thirty years the Government did not find it necessary to appoint any Election Commissioners. The entire business of the Election Commission was left to be conducted by the Chief Election Commissioner: each CEC was a distinguished Civil Servant who invariably acted, and (what is most important) was seen to act independently of the Government.

An example: in early 1982 prominent members of the Congress Party sought to restrain the Election Commission and its officers issuing Notifications calling for Elections to the West Bengal Legislative Assembly on the ground that the electoral rolls had not been "duly and properly revised". Interim restraint orders were passed by a Single Judge of the Calcutta High Court. The then Chief Election Commissioner moved the Supreme Court on the ground that the election process was being thwarted by "frivolous and baseless" objections - the electoral rolls (he said) had been updated and properly transferred to and heard by a Constitution Bench of the Supreme Court. It was a very important case with vast political implications: the CPI(M) contending that the Assembly Elections must be called, the Congress Party saying: "not yet". The Union of India (i.e. the Central Government) was represented in the Supreme Court by all its Law Officers who appeared to support the interim order of the High Court of Calcutta. The Election Commission was represented by its own Counsel, who asked the Supreme Court to vacate the interim order of the Calcutta High Court. The contentions urged by the Election Commission before the Supreme Court were diametrically opposed to those advanced on behalf of the Union of India. The CEC then was Mr. Shakdher and this was his finest hour.

Election Commissioners were appointed for the first time only in 1989 - and then, with questionable motives. In October, 1989 (by successive notifications) the number of Election Commissioners (other than the CEC) was fixed at two, and two Government officials were appointed to fill the posts - their tenure under the statutory rules then in operation was five years. Within the first three months the notification of October 1989 fixing the number of Election Commissioners at two was "rescinded". The two Election Commissioners, though appointed to hold and expected to hold office for five years from October, 1989, were turfed-out from the Election Commission. They challenged the rescinding notifications before the Supreme Court - and failed! *S. S. Dhawan v. Union of India* (July 24, 1991). The Court then held that the Elections Commissioners who were appointed in October, 1989, were appointed without any valid reason and implied that these Election Commissioners, ap-

peared to have been appointed only to give them employment, and accordingly "no one need shed tears that the posts (of Election Commissioners) were abolished"!

In January, 1991, the Central Government decided that the salary, pension and other conditions of service of the CEC should be equivalent to that of a Judge of the Supreme Court and the Comptroller and Auditor General of India, and that the salary, pension and conditions of service of an Election Commissioner should be equivalent to those of the High Court. This decision was translated into law - the Chief Election Commissioner and Other Election Commissioners (Conditions of Service) Act, 1991. But as to how may posts there should be of Election Commissioners, and when they should be filled still remained at the absolute discretion of the Central Government. Accordingly, the status of irremovability, during tenure, which had been deliberately conferred on the CEC by the Constitution of India, 1950, (to ensure his independence) was not conferred on the Election Commissioners: not by the Act of 1991: not even by the later Ordinance of October 1, 1993, which amended this Act, and which provided for all decisions in the new multi-member Election commission to be unanimous, and failing unanimity, by majority. Before treating the CEC and the ECs on par in decision-making it was essential that they were placed on par also in independent-functioning.

This is not to suggest that the present ECs may not function independently. Far from it. When the Court says in its judgment that "it is wrong to think that the two ECs (Gill and Krishnamurthy) are pliable persons" it speaks correctly - they are not pliable nor is Mr. Seshan.

Occasional (or may be, frequent) aberrations apart, Mr. Seshan has captured the imagination of the public - as a doer. Years ago Jean Monet, Father of the European Community, had said that there were two kinds of people in this world "those who want to be somebody and those who want to do something". The tragedy is that Mr. Seshan is *both* these "kinds of people".

I believe that public confidence in the integrity of a three-member Commission can only be maintained if it is made a permanent feature beyond the reach of Governmental Notification, the offices of the Election Commissioners are institutionally insulated from the influence and pressure and these offices are seen to be as independent from Government controls as is the Office of the Chief Election Commissioner.