

## EXPLORING THE DUALITY OF THE ELECTION COMMISSION AND THE SCOPE OF JUDICIAL REVIEW

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*Recently, there has been a spate of litigation in cases of disqualification of members of parliament and legislative assemblies. Given the existence of the Election Commission, a constitutional body that has been vested with quasi-judicial powers, one must examine the scope of these powers. This author seeks to explore the duality of its adjudicatory powers – in cases of disqualification and in cases of dispute regarding election symbols. It appears that in the former, the Commission has greater procedural constraints and that its decision acquires the finality of a presidential or gubernatorial order. However, in the latter, the Commission's decision is subject to judicial review as it is a Tribunal as under Article 136. The author reasons that given this constitutional scheme, there is a substantial difference in the procedural constraints and rigour exercised by the Commission while dealing with these two categories of cases – the legislature has conferred considerable powers of Courts to the Commission for reference cases. This is necessary given the reduced scope of judicial review of these decisions and the centrality of elections in our democratic polity.*

### INTRODUCTION

Elections are the touchstone upon which democracy is built and are, thus, fundamental to the Indian polity.<sup>1</sup> Given the practical realities of electoral competition, it is inevitable that disputes arise out of them. The Election Commission is a constitutional body set up for the smooth conduct of free and fair elections.<sup>2</sup> It also has quasi-judicial powers<sup>3</sup>comprehended in

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<sup>1</sup>INDIA CONST., Preamble.

<sup>2</sup>INDIA CONST., art. 324.

<sup>3</sup>All Party Hill Leaders' Conference v. Captain W.A. Sangma and Ors, (1977) 4 S.C.C 161 (India) para 42. ("The Commission is created under the Constitution and is invested under the law

power of “*superintendence, direction and control*” vested in it. In this paper, I shall argue that although the proceedings in the case of reference from the President or Governor under Article 103(2) or 192(2) of the Constitution [hereinafter a reference to “Article” shall mean reference to the Article of Constitution of India] and in cases under Paragraph 15 of the Election Symbols (Reservation and Allotment) Order, 1968 are both quasi-judicial, they materially differ to the extent that in the former proceedings, there is greater investiture of “*trappings of the court*”<sup>4</sup> in the Commission and this is necessary since unlike the latter, the decision of the Commission takes the form of Presidential (or gubernatorial) order and is final. Further, by virtue of this, the Election Commission would not be a tribunal for the purposes of Article 136(1), while it could be considered one in case of symbols disputes.

This distinction is extremely relevant today given the rise of coalition politics and increased involvement of courts in cases of disqualification of the elected representatives to the legislature. It is at the heart of this distinction that the scope and route of judicial review in disqualification disputes lie. This is important because these disputes, are often considered “urgent”, listed before the Courts and heard immediately. It is necessary to examine whether this expenditure of judicial time and addition to the backlog of cases is following the right routes given the number of disqualification disputes in the recent past. For instance, recently, the dispute regarding the disqualification of the members of the Tamil Nadu legislative assembly saw considerable judicial intervention. The matter in the High Court saw a split verdict and had to be heard afresh by a third judge. Then the parties concerned moved the Supreme Court seeking a transfer which was ultimately rejected and a third judge was appointed.<sup>5</sup> Similarly, the dispute regarding the disqualification of the members of the

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*with not only the administrative powers but also certain judicial powers of the State, however fractional they may be.”).*

<sup>4</sup> *Engineering Mazdoor Sabha v. Hind Cycles Ltd.*, AIR 1963 SC 874 para 6 (India) (“*It would thus be noticed that apart from the importance of the trappings of a Court, the basic and essential condition which makes an authority or a body a Tribunal under Article 136, is that it should be constituted by the State and should be invested with the State’s inherent judicial power.*”).

<sup>5</sup> Ani, *SC Refuses to Transfer ALADMK Disqualification Case*, THE NEW INDIAN EXPRESS (June 27, 2018, 02:48 PM), <http://www.newindianexpress.com/nation/2018/jun/27/sc-refuses-to-transfer-aiadmkn-mla-disqualification-case-1834448.html>.

Delhi legislative assembly came before the Delhi High Court which then sent it back to Election Commission.<sup>6</sup>

In order to explore this difference and its implications, I shall first briefly discuss the distinction between a court and a tribunal. I shall then discuss how the Election Commission has the authority to adjudicate in both – cases of disqualification and disputes of symbols. I shall further explain the nature of adjudication by the Election Commission under Article 103(2) or 192(2) and Paragraph 15 of the Election Symbols (Reservation and Allotment) Order, 1968 respectively. I shall then look at what the “finality” of the presidential or gubernatorial order means for judicial review and procedural route to be followed. To conclude, the difference between the two forms of adjudication have been summed up and the need for this difference shall be highlighted.

## I. DIFFERENCE BETWEEN A TRIBUNAL AND A COURT

The distinction between the nature, powers and procedural rigour of courts and tribunals has often been dealt with by the Courts and the position is settled law. In this section, I shall not be delving into it in depth. My aim is merely to provide sufficient backdrop for the distinction I draw between the capacities of the Election Commission when it is adjudicating different kinds of disputes.

Simply put, courts refer to places where justice is administered and vested with the judicial power of the state to maintain and uphold rights, impose penalties and to adjudicate disputes.<sup>7</sup> Tribunals, on the other hand, are statutorily created special alternative mechanisms. Their power is limited and they can only decide disputes arising with reference to that particular stature or to adjudicate upon administrative issues.<sup>8</sup> Tribunals may be very similar to Courts but they are not courts. They are outside the pale of the

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<sup>6</sup>*AAP MLA Disqualification Case: Delhi High Court Restores Membership*, THE TIMES OF INDIA (Mar 23, 2018, 10:00PM), <https://timesofindia.indiatimes.com/india/office-of-profit-case-delhi-hc-restores-membership-of-20-disqualified-aap-mlas-refers-case-to-ec/articleshow/63428405.cms>.

<sup>7</sup>*Union of India v. R. Gandhi*, President of Madras Bar Association, (2010) 11 SCC 1 para 12 (India) .

<sup>8</sup>*Id.*

hierarchy of civil judicature.<sup>9</sup> Merely acting “judicially” does not make the authority a Court – it only establishes a standard of conduct. Tribunals, unlike Courts, are not required to follow a strictly prescribed procedure.<sup>10</sup> Tribunals do not have the inherent power of the State for the administration of justice at large. They can also be presided over by technical members or experts in a field to which the Tribunal relates and do not need to be exclusively operated by Judges. They do not have the detailed statutory rules and are not bound by the Civil Procedure Code, 1908 or the Indian Evidence Act, 1872. They are generally allowed to regulate their own procedure as long as they follow the principles of natural justice.<sup>11</sup>

To summarise, as the Court observed in *Kihoto Hollohan v. Zachilhu*, “*Where there is a lis - an affirmation by one party and denial by another - and the dispute necessarily involves a decision on the rights and obligations of the parties to it and the authority is called upon to decide it, there is an exercise of judicial power. That authority is called a Tribunal if it does not have all the trappings of a court.*”<sup>12</sup> Hence, for a body to be considered to be discharging the functions of a Tribunal, it must at the very least: (a) be vested with and exercise judicial power and (b) adjudicate upon a *lis*. With this understanding in place, I shall proceed to locate the source of the Election Commission’s adjudicatory power when it is discharging different quasi-judicial functions.

## II. SOURCE OF ADJUDICATORY POWER – TRIBUNAL OR NOT?

The Election Commission performs multiple functions and it derives power from different sources for each of them. Here, we shall just be looking at the source of the adjudicatory power of the Election Commission. It can be seen that different sources vest the Election Commission with the power to adjudicate reference cases and symbols disputes. I shall show that the two sources of adjudicatory power differ

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<sup>9</sup> *Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala*, (1962) 2 SCR 339 para 13 (India).

<sup>10</sup> *Associated Cement Companies v. P.N.Sharma and Anr.*, AIR 1965 SC 1595 (India).

<sup>11</sup> *Supra* note 6, para 14.

<sup>12</sup> *Kihoto Hollohan v. Zachilhu*, (1992) Supp (2) SCC 651 (India).

substantially in their nature and that the Election Commission is *not* a tribunal for the purposes of Article 136(1) when it deals with reference cases.

In the case of the President or the Governor referring an election petition regarding disqualification of an existing member of the Parliament or the Legislative Assembly,<sup>13</sup> technically the Election Commission does not “*discharge judicial functions*”<sup>14</sup> and has not been “*clothed with the State’s inherent judicial power to deal with disputes between parties.*”<sup>15</sup> Instead, it *tenders opinion* to the President or the Governor.<sup>16</sup> It does not “*act judicially and reach a (their) decision.*”<sup>17</sup> Here, it is pertinent to note the language of Article 103(1) which states that the “*decision of the President*” shall be final.

The Commission is not required to conduct an inquiry in such cases unless it “*considers it necessary or proper*” and it “*cannot come to a decisive opinion on the matter*”.<sup>18</sup> In other words, in all matters where such a reference as above is made to the Commission, there is no “*lis between two groups*” and the Commission is not the “*specified and exclusive adjudicating authority of the lis.*”<sup>19</sup> Since it is not a *lis* the Commission tenders an opinion upon reference, even if the complainant wishes to withdraw his petition.<sup>20</sup> Even in case of an inquiry, it is deemed to be a judicial proceeding only insofar as Sections 193 and 228 of the Indian Penal Code, 1860 are concerned.<sup>21</sup> This implies that it is not a judicial proceeding but is considered to be one for the limited purpose of imposing penalty for furnishing false evidence or insulting and intentionally interrupting the inquiry.<sup>22</sup>

The Election Commission derives its adjudicatory power (in reference cases) from the judicial power vested in the President or the Governor.<sup>23</sup>

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<sup>13</sup>INDIA CONST., art. 103 (2); art 192 (2).

<sup>14</sup>*Supra* note 9.

<sup>15</sup>*Supra* note 9.

<sup>16</sup>INDIA CONST., arts. 103(2) and 192(2); Government of Union Territories Act, No. 20, Acts of Parliament, 1963 (India), § 14.

<sup>17</sup>*Supra* note 4.

<sup>18</sup>Representation of People Act, No. 43, Acts of Parliament, 1950 (India)[hereinafter *Representation of the People Act*], § 146(1).

<sup>19</sup>*Supra* note 3, at paras. 36-37.

<sup>20</sup>*In Re: Maharaja Anand Chand*, 5 ELR 197 (India).

<sup>21</sup>Representation of the People Act, § 146 (4).

<sup>22</sup>Indian Penal Code, No. 45, Acts of Parliament, 1860, §§ 193, 228.

<sup>23</sup>MP JAIN, INDIAN CONSTITUTIONAL LAW , VOL.2 1581 (7<sup>th</sup> ed., 2012).

This is buttressed by the powers conferred on it by provisions of the Representation of People Act to facilitate the inquiry.<sup>24</sup> Thus, the Election Commission has *not* been vested with the judicial powers of the State. Rather, it has the authority to adjudicate to *facilitate* the exercise of the powers vested in the President.

However, in case of disputes regarding symbols, the Election Commission has been conferred plenary powers by Rule 5, 10(4) and 10(5) of the Conduct of Election Rules, 1961 read in consonance with Article 324.<sup>25</sup> The Election Symbols (Reservation and Allotment) Order, 1968 has been framed by the Commission in the exercise of this power. It also finds direct statutory backing in Section 29A of the Representation of People Act, 1951 which states that the Election Commission is responsible for the registration of associations and bodies as political parties. One of the matters which arise in relation to the specification, reservation, choice and allotment of symbols is disputes when two rival sections of a recognised political party claim to be that party for the purpose of the Symbols Order. Paragraph 15 of the Order “*provides the machinery as well as the manner of resolving such a dispute.*”<sup>26</sup> The *decision* of the Commission in such disputes has been made binding on all the rival sections or groups in question.<sup>27</sup> As the apex Court has clarified, “*the power to decide this particular dispute,*” of which rival faction is the party for the purposes of the Symbols Order, “*is a part of the State’s judicial power.*”<sup>28</sup> “*The principal and non-failing test which must be present in order to determine whether a body or authority is a tribunal within the ambit of Article 136(1) is fulfilled in this case when the Election Commission is required to adjudicate a dispute between two parties.*”<sup>29</sup> Hence, here, the Election Commission has been vested with the judicial power of the State.

### III. ADJUDICATION IN DISQUALIFICATION DISPUTES

On the successful conduct of elections, questions may arise regarding the disqualification of duly elected members to either house of the

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<sup>24</sup>Representation of the People Act, §§ 146, 146A, 146B.

<sup>25</sup>Sadiq Ali and Anr. v. Election Commission of India and Ors, (1972) 4 SCC 664 (India); *See also*, Roop Lal Sathi v. Nachhattar Singh Gill, (1982) 3 SCC 487 para18 (India).

<sup>26</sup>Sadiq Ali and Anr. v. Election Commission of India and Ors, (1972) 4 SCC 664 para 20 (India).

<sup>27</sup>*Id.*, para 22.

<sup>28</sup>*Supra* note 3, para 38.

<sup>29</sup>*Id.*

Parliament<sup>30</sup> or the legislature of a state.<sup>31</sup> The grounds for disqualification are provided in the Constitution itself.<sup>32</sup> Since the Election Commission has not been conferred with original jurisdiction regarding the question of disqualification, it must confine its inquiry to the allegations referred to by the President in terms of Article 103.<sup>33</sup> The scope of inquiry is restricted to disqualifications to which a member *becomes subject to after he is elected* as such and neither the President or Governor, nor the Commission has jurisdiction to inquire into disqualifications which arose *before* the election. In other words, there must be a *change in the position* of the member *after* he was elected.<sup>34</sup>

There is no prescribed procedure which the Commission must follow for the purposes of this inquiry and it can regulate its own procedure.<sup>35</sup> Nonetheless, it has been granted certain powers of a civil court under Section 146 of the Representation of People Act, 1951 while trying a suit. Some of these powers include summoning and enforcing attendance of persons, requiring production of documents as evidence, receiving evidence on affidavits, requisitioning public records and issuing commissions for examination of witnesses and documents.<sup>36</sup> This implies that it has been “*clothed with some powers of the court*”.<sup>37</sup> While administrative adjudication does not require the concerned authority to have all the powers that the Election Commission has been granted for this purpose, it is argued that this provision, that is, the aforementioned Section 146, has made the proceedings of the Commission more formal, or closer to court proceedings, than in other cases of administrative adjudication, specifically the disputes regarding symbols.

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<sup>30</sup>INDIA CONST., art. 103, cl. 1.

<sup>31</sup> INDIA CONST., art. 192, cl. 1.

<sup>32</sup>INDIA CONST., art. 102; art 191.

<sup>33</sup>HS DOABIA, DOABIA AND DOABIA LAW OF ELECTIONS AND ELECTION PETITIONS VOL 2, 3085 (5<sup>th</sup> ed. 2016).

<sup>34</sup> Election Commission of India v. Saka Venkata Rao, AIR 1953 SC 210 paras. 14-16 (India); *see also*, Brundaban Naik v. Election Commission, AIR 1965 SC 1892 (India); Election Commission v. N.G.Ranga, AIR 1978 SC 1609 (India).

<sup>35</sup>Representation of the People Act, § 146B.

<sup>36</sup>Representation of People Act, § 146.

<sup>37</sup>*Supra* note 4 at para. 6 (“They can compel witnesses to appear, they can administer oath, they are required to follow certain rules of procedure...they must decide on evidence adduced before them.”)

Although the Commission cannot take cognizance of a complaint directly, once a question has been referred to by the President to the Commission for its opinion, all further correspondence by the Commission by way of its notices or otherwise is done directly with the concerned parties. All pleadings, be it written statements, rejoinders, affidavits are filed by the parties directly before the Commission. It does not have to be routed through the President's Secretariat. This is the procedure followed by the Commission in the exercise of its powers under Section 146B of the Representation of People Act, 1951 in reference cases.<sup>38</sup>

The Election Commission has itself clarified that the inquiry in cases of references from the President and Governors under Articles 103(2) and 192(2) respectively is a quasi-judicial proceeding. It has further stated that it “*is guided by and follows the principles, procedures and policy adopted by the Supreme Court and the High Courts.*”<sup>39</sup> This, read in consonance with Section 146B of the Representation of People Act, 1951, indicates that it has opted to follow the rigour of court proceedings, despite such procedures and principles not automatically being applicable to administrative proceedings.<sup>40</sup> The Commission has chosen to be bound by the previous decisions it has rendered. It also strictly complies with judicial precedents and all applicable statutory provisions in its analysis. In many cases, it has held documentary and other evidence to a strict standard. For instance, in the case where the question of disqualification of Digambar Vasant Kamat, a Member of the Legislative Assembly of Goa was referred to the Commission, the issue was whether he stood disqualified under Section 9A of the Representation of People Act for a subsisting government contract. The Commission examined the evidence before it to conclude that there was no evidence to support the conclusion that Mr. Kamat was personally associated with the company, managed the company or entered into a government contract in the course of business or trade. In order to

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<sup>38</sup> Prashant Patel v. Praveen Kumar and Ors, Reference Case No. 5 of 2015, Decided on 26.7.2016 (Election Commission of India) para 6.

<sup>39</sup> Reference Cases No. 7, 8, 10, 11 and 36 of 2006, Decided on 7.4.2006 (Election Commission of India). These cases deal with the alleged disqualification of Sonia Gandhi, Jaya Bachan, Balbir Punj amongst others.

<sup>40</sup> Union of India v. T.R.Varma, AIR1957 SC882 (India); New Prakash Company Ltd. v. The New Suwarna Transport Company Ltd., AIR 1957 SC 232 (India). They agree on the proposition that only principles of natural justice apply to administrative and quasi-judicial tribunals and not the strict technicalities of the Indian Evidence Act, 1872.

reach this opinion, it relied upon the principle of documentary evidence. His resignation letter tendered to the Registrar of Companies and the transfer of shares to his wife *before* he filed his nomination being primary evidence was given adequate weight during appreciation of evidence to conclude there was no subsisting contract.<sup>41</sup>In yet another case, the Election Commission employed the principles of burden of proof and documentary evidence to support the conclusion that the concerned members of the legislative assembly were not holding any office of profit. It observed that the log books of vehicle usage could not be considered evidence proving any relevant fact. It further stated that there was no other forthcoming documentary evidence furnished by the Complainant to support the claim that the respondents were holding offices of profit and hence, there were no grounds to support the disqualification.<sup>42</sup>The rigour with which principles of documentary evidence are followed can be seen in the opinion of the Commission in yet another case. Here, the Commission admonished the parties for not following procedure while furnishing evidence. It also did not take cognizance of a certain document because only a photocopy, that is secondary evidence, was available. It also pointed out that the manner of procurement of the photocopy was in question and did not place any reliance on the same.<sup>43</sup>

As seen above, there are considerable ‘trappings of the court’ in the way the Election Commission deals with reference cases which follow a high degree of procedural rigour. At this junction, it must be pointed out that in court proceedings and administrative proceedings, there needs to be application of the judicial mind and judicial determination of the issues at hand. However, the degree of procedural rigour in administrative adjudication differs depending on the powers and object of the authority concerned for that particular purpose and is lesser than what courts are mandated to follow. It is not always as high as it is in the treatment of reference cases by the Election Commission.

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<sup>41</sup>Reference Case No. 7(G) of 2017, Decided on 1.8.2017 (Election Commission of India).

<sup>42</sup>Reference Case No. 9(G) of 2018, Decided on 18.10.2018 (Election Commission of India). This involved Uma Shankar Gupta and Deepak Joshi, both Members of the Legislative Assembly of Madhya Pradesh.

<sup>43</sup>Reference Case No. 7(G) of 2015, Decided on 23.6.2017 (Election Commission of India). This pertained to the disqualification of Praveen Kumar and 20 other Members of the Delhi Legislative Assembly.

#### IV. ADJUDICATION IN SYMBOLS DISPUTES

Courts have opined that symbols play a crucial role in the electoral process of our country, given that an overwhelming majority is illiterate and cannot cast an informed vote unless there is some pictorial representation by which the voter can identify the candidates of his choice.<sup>44</sup> Over time, symbols have acquired tremendous value because they are so intertwined with the identity of parties and are a central feature of all election campaigns. It is often the symbol and not the individual candidate which garners the vote for a party. Hence, in case there is a split in a political party, both rival factions are keen to capitalize on the goodwill and vote-bank associated with the symbol, which generally gives rise to disputes.

Under Paragraph 15 of the Symbols Order, the Commission has discretion to the extent that it can decide either that one rival section is the recognised political party or that none of the sections are. In order to arrive at this decision, it has to take into account all available facts and circumstances of the case and hear the representatives of the sections or groups and other persons who desire to be heard. This is the *only* procedural requirement that has been stipulated for the purpose of adjudicating disputes that arise from this provision. It must be noted that the Commission has not been granted powers to regulate its own procedure for this purpose. This implies it will be bound by general judicial principles and the principle of natural justice.<sup>45</sup> This, in turn, means that the aforementioned procedural requirement of hearing “*all available facts and circumstances*” and “*other persons as desire to be heard*” is diluted by the rules of absurdity and the pragmatic realities of administrative adjudication.<sup>46</sup> This means the Commission can selectively refuse to hear facts or statements if it considers them to be irrelevant or

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<sup>44</sup>*Supra* note 17 at para 21.

<sup>45</sup>This is a corollary that follows from the established premise that the Election Commission is considered to be “tribunal” for the purposes of symbols disputes. All tribunals and administrative proceedings are supposed to be follow the principles of natural justice. This has been held to be the position of law in a catena of cases including the case of *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

<sup>46</sup>*Mohinder Singh Gill v. The Chief Election Commission*, AIR1978 SC 851 para. 43 (India) (“*Audi alteram partem* is the justice of the law, without, of course, making law lifeless, absurd, stultifying, self- defeating or plainly contrary to the common sense of the situation.”)

that it would inordinately prolong the proceedings<sup>47</sup> since this matter has to be dealt “*with a certain measure of promptitude and it has to see that the inquiry does not get bogged down in a quagmire.*”<sup>48</sup> Further, the decision of the Commission, while binding, is not final and can be subject to judicial review by virtue of a special leave petition.<sup>49</sup> Further, there is reduced procedural compliance in the symbols disputes decided by the Commission. As noted above, apart from the sole criterion of examining all facts and circumstances, which is also diluted, there are no stipulated procedural requirements. This has been noted by the Supreme Court where it stated the Commission is a “*constitutional functionary*” and the bench was “*absolutely certain that it shall be guided by the procedure known to law.*”<sup>50</sup> Albeit the vote of judicial confidence in the body, this betrays the fact that there is currently no procedure established by law to govern the proceedings of the Election Commission in this regard.

The test that the Commission has to apply to determine which rival faction is the recognized political party has been approved by the Supreme Court. It is a test of the majority, that is, the numerical strength of the rival groups, both in the legislative and organisational wings of the party,<sup>51</sup> and remains the law today.<sup>52</sup> Recently, the argument that in the event of a split in the political party, the test ought to be based on the

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<sup>47</sup>*Supra* note 36, at para 14. (“Since the life of the law is not logic but experience and every legal proposition must, in the ultimate analysis, be tested on the touchstone of pragmatic realism, the audi alteram partem rule would, by the experiential test, be excluded, if importing the right to be heard has the effect of paralysing the administrative process or the need for promptitude or the urgency of the situation so demands.”)

<sup>48</sup>*Supra* note 17, at para 28.

<sup>49</sup>*Supra* note 3. In this case, the Court held that the Election Commission was a tribunal for the purposes of Article 136(1) thereby giving the Court appellate jurisdiction by virtue of special leave petition.

<sup>50</sup> T.T.V. Dhinakaran v. B. Ramkumar Adityan and Ors., SLP (C) No, 26811-26812 of 2016, Order passed on 6.10.2017.

<sup>51</sup>*Supra* note 17, at para 24. This decision was rendered before the introduction of Section 29A in the Representation of People Act, 1951 but is still good law. The Commission itself has clarified this issue by stating that Section 29A is restatement of what is encapsulated in Paragraph 3 of the Symbols Order. There has been no material change in the procedure of registration of political parties and the applicant parties were required to furnish the party constitutions even under Paragraph 3.

<sup>52</sup>Section 6, Representation of People (Amendment) Act, No. 21 of 1989 § 6.

provisions of the party constitution was dismissed.<sup>53</sup> The materials provided before and relied on by the Commission for adjudication are mainly the party constitution and affidavits of members and submissions are made by counsels with rare, if any, examination of witnesses.<sup>54</sup> These affidavits are not in the nature of affidavits of evidence in a civil suit.<sup>55</sup>

In the dispute between the two rival factions of All India Anna Dravida Munnetra Kazhagam following the death of J. Jayalalithaa, one of the contentions raised by the respondents was that the deponents of almost all affidavits filed by the petitioner had first given affidavits of support to the respondent and had later retracted them. Given the circumstances under which the retraction happened, there was a high chance of the signatures on the affidavits being false and fabricated. On this ground, they asked to be allowed to produce and cross-examine the deponents. The Commission reiterated that it was not bound by the law of evidence and the “*right to cross-examine was not an indispensable concomitant of natural justice.*”<sup>56</sup> It denied the respondents the right to cross-examine on the ground that it would lead to an interminable inquiry and would contradict the judicial dictum to act with promptitude. Further, while discussing the discrepancies in the affidavits and the allegations regarding them, the Commission stated that it is “*a quasi-judicial authority and not a court, and therefore, the provisions of the Civil Procedure Code and the Evidence Act do not strictly apply to the present proceedings before the Commission under para 15 of the Symbols Order.*”<sup>57</sup> More importantly, in this case, the Commission discussed the powers vested in it and analysed whether it has any “trappings of the Court” as against the criteria listed by the apex Court in *Jaswant Sugar Mills*

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<sup>53</sup>Group led by Akhilesh Yadav and Ram Yadav v. Group led by Mulayam Singh Yadav, Dispute Case No. 1 of 2017, Decided on 16.1.2017 (Election Commission of India).

<sup>54</sup>Group led by Akhilesh Yadav and Ram Yadav v. Group led by Mulayam Singh Yadav, Dispute Case No. 1 of 2017, Decided on 16.1.2017 (Election Commission of India); P.J. Joseph v. P.C. Thomas, Dispute Case of 2010, Decided on 11.6.2012 (Election Commission of India); Kennedy Afonso group v. Antonio Gauncar group, Dispute Case of 2012, Decided on 9.2.2012 (Election Commission of India).

<sup>55</sup> E. Madhusudhanan and Ors v. V.K. Sasikala and Anr., Dispute Case No. 2 of 2017, Decided on 23.11.2017 (Election Commission of India) para 22.

<sup>56</sup>*Id.*, at para 44,

<sup>57</sup>*Supra* note 45, at para 59.

v. *Laxmichand and Ors.*<sup>58</sup> It would be useful to cite the extract from the decision to better conclude this argument,

*“In that case, the court discussed the meaning of investiture of “trappings of a court”, such as sitting in public, power to compel attendance of witnesses and examine them on oath, provision for imposing sanctions by way of imprisonment, fine, damages etc. On that standard, the Commission is not a court for the purposes of proceedings under paragraph 15 of the Symbols Order, not being invested with any of the aforementioned ‘trappings of a court’.”*<sup>59</sup>

## V. SCOPE OF JUDICIAL REVIEW IN DISQUALIFICATION CASES

Having now established that the Election Commission performs its adjudicatory functions in two different capacities, it is now important to look at the implications of the same. What does the finality of the presidential or gubernatorial order in reference cases mean? The Supreme Court, in *Brundaban Nayak v. Election Commission of India*,<sup>60</sup> stated that under Article 192(1), the power to render a decision in disqualification cases vests solely on the Governor and Governor alone (or the President, as the case may be under Article 103(2)). *“No other authority can decide it, nor can the decision of the said decision as such fall within the jurisdiction of the Courts.”*<sup>61</sup>

Does it oust the jurisdiction of the Courts entirely? It would be helpful to look at the case of *Union of India v. Jyoti Prakash*.<sup>62</sup> In this case, the word “final” in Article 217(3) of the Constitution was considered and the Supreme Court observed that *“Notwithstanding the declared finality of the order of the President, the Court has jurisdiction in appropriate cases to set aside the order if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President’s judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. Appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence, placed before the President on which the conclusion is founded if they were*

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<sup>58</sup> 1963 Supp 1 SCR 242.

<sup>59</sup> *Supra* note 45, at para 60.

<sup>60</sup> 1965 SCR (3) 53.

<sup>61</sup> *Id*, at para 13.

<sup>62</sup> 1971 SCR (3) 483.

*called upon to decide the case they would have reached some other conclusion.*<sup>63</sup> Given the peculiarities of Articles 103(2) and 192(2), this observation will undoubtedly have to be qualified: *one*, here, the President or the Governor is constitutionally mandated to adhere to the opinion tendered by the Election Commission. *Two*, the appreciation of evidence is within the realm of the Election Commission's duties. Nonetheless, it is submitted that the import of the decision remains applicable to the cases of disqualification as well. It is evident that due to the "finality" of the order, the scope of judicial review is much narrower than how it is currently being exercised. The Courts must restrain themselves to examining whether there has been any violation of the principles of natural justice, any consideration of collateral issues or if the opinion tendered by the Election Commission is entirely unfounded on evidence.

It is trite law now that judicial review is a facet of the basic structure of the Constitution and cannot be ousted barring a few exceptional cases.<sup>64</sup> However, it is submitted that since the Election Commission is not a tribunal for the purpose of adjudication of reference cases,<sup>65</sup> the Supreme Court must not entertain disqualification cases directly since they are outside the ambit of Article 136. The High Courts can still exercise their power of judicial review due to the relatively expansive nature of Article 226 but it too must restrain its examination to the aforementioned grounds. The Supreme Court can only allow an appeal from this decision of the High Court and even then the scope of examination remains limited.

## CONCLUSION

Through this article, I first established that there is a clear difference in the adjudication that the Election Commission does under Articles 103(2) and 192(2), and under Paragraph 15 of the Symbols Order. To summarise

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<sup>63</sup>*Id.*, at para 31.

<sup>64</sup> This has been held and reiterated in several cases. *See* Keshavnanda Bharti v. Union of India, AIR 1973 SC 1471 (India) ; Minerva Mills Ltd.v. Union of India, AIR 1980 SC 1789 (India); I.R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861 (India); L Chandrakumar v. Union of India, (1993) 4 SCC119 (India); Waman Rao v. Union of India, (1981) 2 SCR1 (India).

<sup>65</sup>S.P. Sampath Kumar v. Union of India(1987) 1 SCC 124 (India): It held that the order of a Tribunal is always subject to the power of Judicial review of the High Court and the Supreme Court.

this difference, in disqualification disputes, the judicial power remains vested in the President (or Governor, as the case may be) and there is no transfer of the state's inherent judicial power to the Commission which merely in a facilitative capacity. The Commission tenders its *opinion* and does not *decide* the dispute. On the other hand, in case of symbols disputes, the judicial power of the state has been vested in the Commission and can be sourced from the Constitution and statutes. It has sole adjudicatory jurisdiction with respect to disputes that arise under the concerned provision. It renders a decision regarding the dispute between two parties, that is, the rival factions of the political party.

I also highlighted the difference in the procedural rigour. In disqualification cases, the Election Commission has the discretion to conduct an inquiry in order to arrive at an opinion. It has been statutorily vested with certain powers of a civil court to aid this inquiry. It has the freedom to regulate its own procedure and it has opted to follow the policy, principles and process of the higher judiciary. Whereas when it adjudicates upon symbols disputes, it does not have to follow any particular procedure other than taking into account all the facts and circumstances and hearing the parties. It is governed by the principles of natural justice and has not been statutorily vested with any 'trappings of the Court'. It has not adopted any standard procedure.

Thus, I drew the distinction that the Election Commission is not a tribunal for the purposes of disqualification cases but it will be considered as one when it comes to symbols disputes. Based on this, I argued that there is a difference in the scope of judicial review. Under Articles 103(2) and 192(2), the opinion of the Election Commission takes the form of decision of the President or the Governor and is declared to be "final." It is this finality that reduces the scope of judicial review and the judiciary can only intervene to the extent of determining whether the petition before the President was within the scope of Article 103(1) and if the order was consistent with principles of natural justice and backed by evidence. Further, since it is not a tribunal, the aggrieved parties cannot directly approach the Supreme Court under Article 136. On the other hand, the Commission is a tribunal under Article 136(1) for the purposes of symbols disputes and its decisions are subject to judicial review by virtue of both writ and special leave petitions filed before the Supreme Court and the High Courts. Finally, I submit that this decreased scope of

judicial review in disqualification cases is not inherently unfair since it adheres to a greater standard of procedural rigour which is necessary since *“an election dispute is not like an ordinary lis between private parties. The entire electorate is vicariously, not inertly, before the Court.”*<sup>66</sup>

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<sup>66</sup>Mohinder Singh Gill v. The Chief Election Commission, AIR 1978 SC 851 para 15 (India).