

State Legislative Brief

ANDHRA PRADESH

The Andhra Pradesh Panchayat Raj (Second Amendment) Ordinance, 2020

Key Features

- Changes qualification of State Election Commissioner
- Reduces term to 3 years with reappointment
- Current SEC will cease to hold office

Issues to Consider

- Removal of SEC may violate Article 243K
- It may also violate Article 14
- Re-appointment may affect independence of SEC

The AP High Court has struck down the Ordinance. An appeal has been filed in the Supreme Court.

In 1992, the 73rd and 74th amendments to the Constitution of India were passed to provide recognition to local self-governments in all states in India at the urban level (through municipalities) and rural level (through panchayats). Following this, several states introduced laws to implement these provisions. Andhra Pradesh passed the Andhra Pradesh Panchayat Raj Act in 1994. The Act provides for the constitution of various panchayati raj institutions in the state including gram panchayats, and mandal and zilla parishads. It further provides for the appointment of the AP Election Commission for Local Bodies to conduct elections to all such institutions in the state.

On April 10, 2020, the Andhra Pradesh Panchayat Raj (Second Amendment) Ordinance, 2020 was promulgated to amend the 1994 Act with respect to the appointment, qualifications, tenure and conditions of service of the State Election Commissioner in the State Election Commission. Subsequently, the government notified the vacancy of the office created by the cessation of tenure of the Election Commissioner, and appointed a successor Commissioner.^{1,2} The Ordinance and the notifications were challenged before the High Court of Andhra Pradesh.³ The Court struck down the Ordinance on 29th May and restored the SEC to his office until the completion of his tenure.⁴ The state government has filed a special leave petition before the Supreme Court against the decision.⁵

Key Features

Key features of the Ordinance include:

- **Criteria for qualification:** The Ordinance changes the qualification of the State Election Commissioner (SEC) from a person holding the office of at least Principal Secretary to the government, to that of a Judge of the High Court.
- **Tenure:** The Ordinance amends the tenure of office of the SEC from five years to three years. Further, it permits the renewal of the term of the Commissioner by a further three years. No person can hold the office of the SEC for more than six years.
- **Criteria for removal from office:** The Ordinance retains the grounds for removal of a SEC. It states that the SEC cannot be removed unless it is on the same grounds as that of a High Court Judge. Further, his conditions of service cannot be varied to his disadvantage.
- **Termination of SEC:** The Ordinance states that any person appointed as SEC on the date of the Ordinance will cease to hold that office from the date of the Ordinance.

Issues for Consideration

We discuss below some key issues in the Ordinance. We also present a comparative analysis of tenure and qualification requirements of SECs in different states.

The Ordinance may violate certain provisions of the Constitution

Ordinance:
Clause 2

The Ordinance amends the Andhra Pradesh Panchayat Raj Act, 1994 to: (i) remove the current State Election Commissioner (SEC) in the state, (ii) change the qualification criteria of the SEC from Principal Secretary to the government to a Judge of a High Court, and (iii) reduce the tenure of the SEC from five years to three years, with an option for re-appointment. The removal of the SEC may violate the procedure for removal of an SEC specified in the Constitution of India. Further, the provisions for re-appointment to the position of Commissioner of an independent body such as the State Election Commission, may impact its independent functioning. We discuss these below.

Removal of the SEC may violate the procedure for removal set out in the Constitution

Article 243-K of the Constitution vests the power of conducting elections to panchayati raj institutions in the state with a State Election Commission. The Commission consists of a State Election Commissioner (SEC) to be appointed by the governor of the state. The governor has the power to determine the conditions of service and tenure of office of the SEC, subject to any law made by the state legislature. Further, the Constitution grants certain protections to the SEC against arbitrary removal. The SEC cannot be removed unless his removal is on the same grounds as that of a Judge of the High Court, i.e., by an order of the President, based on a motion passed by two-thirds majority of each House of Parliament, for “proved misbehavior or incapacity”. The Ordinance states that any person appointed as the SEC will cease to hold office on the day of its issuance. The question is whether the removal of the SEC violates the procedure for removal set out under Article 243-K of the Constitution.

The Ordinance states that on the day of its issuance, the serving SEC would cease to hold office. It may be argued here that the SEC no longer meets the criteria for holding office since he is not a High Court Judge and therefore will not qualify under the new criteria. However, the sitting SEC was qualified to hold office when he was appointed under the old criteria, i.e., as someone holding the post of at least the Principal Secretary to the government. The Ordinance has the effect of terminating his service. As this has the effect of removing the SEC from office, this would directly affect the security of his office guaranteed to him under Article 243-K and therefore violate the constitutional protection given to the SEC under Article 243-K. Such premature removal would violate the intent behind Article 243-K, which the Supreme Court has held to be important for securing the independence of the Commission, given its role in conducting free and fair elections to local bodies.⁶

In May 2020, the High Court of Andhra Pradesh struck down the Ordinance.⁴ On the ‘cessation’ of the sitting SEC, the Court reasoned that the procedure for removal under Article 243-K has been inserted to ensure that the appointment of the SEC remains un-influenced by political interference so he may conduct elections in a free and fair manner. For this reason, even if the SEC was said to have ‘ceased’ to hold office since he no longer met the criteria for holding office, his cessation from office would amount to ‘removal’ and would therefore need to comply with the procedure for removal under Article 243-K.

The Court interpreted Articles 163, 166 and 243-K to say that the appointment criteria for future SECs can only be decided by the governor at his discretion. It said that the Governor does not have to act on the advice of the Council of Ministers and the state legislature does not have jurisdiction over the process of appointment. Therefore, the Ordinance could not have amended the appointment criteria of future SECs.

Removal of the SEC may also violate Article 14 of the Constitution

The Ordinance may also violate Article 14 of the Constitution. Article 14 of the Constitution guarantees the right to equality to all persons. It permits laws to differentiate between groups of people if the rationale for doing so serves a reasonable purpose.⁷ Whether this provision violates Article 14 needs to be examined, as it provides differential treatment to the serving SEC and future SECs by depriving him of the security of tenure guaranteed to the future SEC. In 2008, the Supreme Court struck down certain amendments to the AIIMS Act, 1956, which introduced a retirement age for the Director of AIIMS, and consequently removed the serving Director who had crossed the retirement age.⁸ The Court noted that the Director was the only person whose term was prematurely terminated because of its provisions, there was no rational for differentiating between him and future Directors, and thus, the provision terminating his tenure violated Article 14.

Note that the AP High Court when striking down the Ordinance stated that it violated Article 14 of the Constitution since the provision only appeared to target the removal of the sitting SEC from office.⁴

Re-appointment of SEC may affect the independent functioning of the Election Commission

The Ordinance amends the 1994 Act to change the tenure of the SEC to three years, with a one-time option for re-appointment. With regard to Appellate Tribunals, such as the National Tax Tribunal (NTT), the Supreme Court has held that provisions for reappointment may undermine the independence of the members of the tribunal.⁹ In the case of the NTT, the Court noted that since the NTT has been vested with the jurisdiction similar to High Courts, it must be shielded from executive involvement in matters of extension of tenure to ensure its independent functioning as an adjudicatory body. Otherwise, members of the Tribunal may be constrained to decide matters in a manner that would ensure their reappointment. The Supreme Court made a similar conclusion in a recent case relating to appointments to a number of tribunals.¹⁰ Since the State Election Commission is a constitutional body tasked with the responsibility of conducting free and fair elections to local bodies, it may be argued that similar provisions for re-appointment of the SEC by the governor (on the advice of the state government) may undermine its independent functioning.

The AP High Court struck down the above provision for re-appointment of the SEC. The Court also noted that the reduction in the tenure of the SEC's office from five years to three years was arbitrary since it was contrary to the intention of Constituent Assembly Debates and expert body recommendations which recommended a tenure of at least five years to secure the independence of the SEC.

Tenure and qualifications for appointment in different states

Several states have enacted their own laws providing for the constitution of the office of the State Election Commissioner and setting out his tenure of office and conditions of service. Note that the term of appointment under most Acts is five years or until the age of superannuation of 65 years is reached, whichever is earlier. Typically, the SEC is also required to be an individual who has held a senior position with the government. The term of appointment and qualifications for SECs in some states is available in Table 1 below.

Table 1: Comparison of the term of appointment and qualifications of SECs in some states

State	Term of Appointment	Qualifications	Re-appointment
Maharashtra	5 years	Holding or held post of at least Principal Secretary to the government	Prohibited
Haryana	5 years or 65 years of age, whichever is earlier	Sitting or former High Court Judge, or worked in the government for five years in the rank of Commissioner, or served as a Financial Commissioner in the state government	No provision
Rajasthan	5 years or 65 years of age, whichever is earlier	5 years' experience in the post of Principal Secretary or equivalent post carrying same pay scale in the state government or equivalent post in the Government of India	No provision
Goa	5 years or 65 years of age, whichever is earlier	Held any Group 'A' post under the central or state government for at least five years and preferably holds a degree in Law from a recognized university	No provision
Bihar	5 years or 65 years of age, whichever is earlier	Additional Secretary or above in central government or holding equivalent post in the state government	No provision

Sources: Maharashtra: State Election Commissioner (Qualifications and Appointment) Act, 1994; Haryana: State Election Commissioner Conditions of Service Rules, 1994; Rajasthan: State Election Commissioner (Conditions of Service) Rules, 1991; Goa: The Goa Panchayat Raj (Conditions of Service of State Election Commissioner) Rules, 1997; Bihar: State Election Commissioner (Appointment and Conditions of Service) Rules, 2008; PRS.

¹ G.O.Ms. No. 618, Notification on Cessation of Tenure, Panchayat Raj and Rural Development (E&R) Department, April 10, 2020.

² Order No.693, The Andhra Pradesh Gazette, April 11, 2020.

³ "Sacked A.P. SEC Ramesh Kumar challenges his removal in High Court", The Hindu, April 12, 2020, <https://www.thehindu.com/news/national/andhra-pradesh/sacked-ap-sec-challenges-ordinance/article31321810.ece>.

⁴ Dr. Ramesh Kumar vs. The State of Andhra Pradesh & Ors, Writ Petition No. 8163 of 2020, High Court of Andhra Pradesh, May 29, 2020.

⁵ Diary No. 12005/2020, Supreme Court of India.

⁶ Kishan Singh Tomar vs. State of U.P., (2006) 6 SCC 352.

⁷ State of West Bengal vs. Anwar Ali Sarkar, AIR 1952 SC 75.

⁸ P. Venugopal vs. Union of India, (2008) 5 SCC 1.

⁹ Madras bar Association vs. Union of India, AIR 2014 SC 1571.

¹⁰ Rojer Mathew vs. South Indian Bank Ltd, 2019 (15) SCALE 615.

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