

CONTEMPORARY INDIAN POLITICS

Internal Dynamics and External Compulsions

Essays in Honour of S. S. Patagundi

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Chapter 10

Elections and Institutional Reforms in India: A Case of the Election Commission

Alaknanda Shingare

The role of election in democracy is indeed significant. Elections provide legitimacy to the political system. It facilitates smooth transfer of power. The Election Commission of India is entrusted with the herculean task of providing free and fair elections. The Election Commission established and maintained its dignity over these years and is looked up to as a significant institution of Indian democratic set up. In a country where people heavily support democracy, functioning of electoral machinery is essential to support furtherance of democracy. It should be independent of executive and legislative control. In recent years, the Election Commissions power to conduct free and fair elections came under question. The larger questions involved in these issues were the manner in which Chief Election Commissioner (CEC) and other Election Commissioners (ECs) are appointed and removed. The present chapter tries to highlight these issues and suggest the need for reform of this institution.

INTRODUCTION

Elections are crucial to democracy. They help in keeping the spirit of democracy alive through smooth transfer of power. Conducting elections in India is a herculean task. Elections in India are compared to festivals or carnivals and the credit of conducting elections in a free and fair manner goes to the Election Commission of India. The Election Commission of India as an institution provided necessary support to the democratic setup of the country. It acted pro-actively to strengthen the democracy. Elections in India are always a challenging task. In a country

with population going up to billion, conducting elections is not an easy task. The Election Commission of India deserves credit for carrying on this herculean task efficiently for over so many years. The Indian political system has provided for secret ballot. It is the responsibility of the Election Commission of India to ensure free and fair elections and the secrecy of vote. One of the major steps towards this direction in recent years is introduction of voter identity cards to prevent impersonation of electors. The Election Commission from time to time also tried to bring reforms in countries electoral system.

The Election Commission of India is set up in accordance with the constitutional provisions. The Constitution also ensured independence and impartiality of the Election Commission by providing security of tenure to the Chief Election Commissioner (CEC). The framers of Indian Constitution provided for single Election Commission to be assisted by regional commissioners for superintendence, direction and control of all elections in India. The centralisation of electoral administration was done to prevent injustice being done by the provincial governments. It was believed that states which represent masses of different culture, language and race may not hold elections in free and impartial manner. They may be biased towards the majority group in the state. To ensure impartiality or biased attitude towards the people other than those who belonged to the province on the basis of race, language and culture, it was thought desirable to have single Election Commission. The Constitution of India provided for appointment of the Chief Election Commissioner. The appointment of other election commissioners is made by President from time to time if necessary. When other election commissioners are appointed, the CEC acts as the Chairman of the Commission. The CEC is provided security of tenure as his removal is not subjected to the executive decision, but can be removed on the grounds and in the manner as the judge of the Supreme Court. The other ECs are removed on the advice of the CEC. Apart from the other ECs, the CEC is assisted by a large paraphernalia of officers subordinate to him which includes Regional Commissioners, Deputy Election Commissioner, Secretary and other staff. Apart from conducting elections, the Election Commission of India is also entrusted with the work of preparation and revision of electoral rolls. The Election Commission is also responsible for demarcation of constituencies, reorganisation of political parties and assigning symbols, scrutinise the accounts of election expenses submitted by candidates and political parties.

The Election Commission of India developed an image of impartial

institution and gained respect over a period of time. It also faced with innumerable challenges in its functioning. The emergence of regional parties, use of money, mafia and muscle power at the time of elections provided a challenge to the functioning of the Election Commission. The Election Commission from time to time tried to introduce reforms to curtail the malpractices at the time of elections which met with success at one time and set back at other. However, as reforms suggested by the Election Commission are subjected to legislative sanctions which sometime delays the process of reform.

However, until very recently when T.N. Seshan became the Chief Election Commissioner, nobody knew of the Election Commission. He brought some firm and bold decisions in the election process of India which are seen as major reforms in elections, but some acts are also seen as a result of arrogant attitude of the single head. With the decision to increase the security deposit of the candidates, more money began to be pumped in the election process by the political parties. However, these efforts were hardly making any dent in the existing conditions, on the contrary, it added to the existing complexities in the electoral process. While there were ongoing debates over bringing electoral reforms, a time came when the Election Commission as an institution came under criticism and led to the examining of the possibilities to reform it. It all started with making the Election Commission a multi-member institution. The Chief Election Commissioner was provided with security of tenure which is not extended to other Election Commissioners who were later added as part of Election Commission.

During the 15th Lok Sabha elections, questions were raised over the impartial functioning of the Election Commission due to the allegations levelled against Navin Chawla. Many scholars felt that the Election Commission which managed to maintain its integrity over these years and was looked upon as an important institution in the functioning of Indian democracy is slowly weakening. In a country where people heavily support democracy, efficient working of electoral machinery is essential. The Election Commission is an important institution of Indian democracy which ensures free and fair elections.

Allegations have been made against Chawla by the opposition Bharatiya Janata Party (BJP) and others, in the National Democratic Alliance. They filed a petition to the former President in 2006 seeking Chawla's removal on the basis of a plea filed in the Supreme Court by BJP leader Jaswant Singh asking for action against Chawla. Before the court's decision, the CEC N.

Gopaldaswami recommended for the removal of Chawla. This stand by the CEC was criticised by the central government. The BJP, after seeking permission from the Supreme Court withdrew its case and filed petition for removal of Chawla to the CEC. The BJP later withdrew the petition in August 2007 following an affidavit filed by the CEC affirming that he had the powers to recommend the removal of an EC (Katju, 2009:5). The question raised during this period is: Does the CEC has *suo motu* power of recommending removal of EC? A whole lot of discussion over appointment and removal of members of Election Commission was also triggered.

The Chief Election Commissioner N. Gopaldaswami's letter to the President recommending removal of the then Election Commissioner Navin Chawla on grounds of partisanship and also the communally charged speech by Varun Gandhi where he accused the Election Commission of taking no action against him are the two incidents which subjected the Election Commission to allegations and counter allegations of partisanship. A series of debates have started on how to ensure independence of the Election Commission which guarantee its impartial nature.

The Navin Chawla episode led to a debate over appointment and removal of CEC and ECs. It was felt that the manner in which the CEC and other Election Commissioners are appointed and removed has its bearing on impartial functioning of Election Commission. The Constitution made the removal of other members of Election Commission subject to the recommendation of CEC and it is this provision which came under scanner. The debate over the manner in which CEC and other members of the Election Commission should be appointed and removed during the constituent assembly debates will help us in understanding the present debate.

CONSTITUENT ASSEMBLY DEBATES

The Constituent Assembly debates support the need for permanent Election Commission which is free from influence of any authority. While reading the draft article, B.R. Ambedkar mentioned that in spite of elections being held every after five years, there will be occasions when by-elections are required or assembly may be dissolved before five years, thus necessitating the keeping of the electoral roll up-to-date. He felt the need for a permanent officer called the CEC, while the President can further add to the machinery by appointing other members when the elections are coming up. Article 289 (2) of the draft provided for appointment of the CEC and such member of the Election

Commissioners, if any, as the President may from time to time appoint. The CEC acts as Chairman when other members are appointed. With regard to the condition of service and tenure of office of Election Commissioners and Regional Commissioners shall be decided by the President (Clause (4) of article 289).

The draft further said that, "Provided that CEC shall not be removed from office except in like manner and on the like grounds as a judge of Supreme Court and the conditions of the service of the CEC shall not be varied to his disadvantage after his appointment. Provided further that, any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner" (Constituent Assembly Debate, 1989: 904).

However, these views of Ambedkar were not accepted by Shibban Lal Saxena and Pandit Hriday Nath Kunzru. Saxena recommended that if the CEC is to be appointed by the President which means by the Prime Minister, it does not ensure their independence. To ensure independence of the Election Commission, it is desirable that the appointment of the CEC by the President enjoys the confidence of 2/3rd majority of both the houses of Parliament. Expressing his doubts over impartiality of future Prime Ministers, he said: "I want that in future no Prime Minister may abuse this right, and for this I want to provide that there should be two-thirds majority which should approve the nomination by the President" (Constituent Assembly Debate, 1989: 904).

With regard to the question of removal of the other Election Commissioners, Pandit Hriday Nath Kunzru put a strong opposition. He argued that when the CEC can discharge his functions without any fear, where he will be removed only on the same ground as the judge of the Supreme Court is removed, the other ECs are left on the mercy of the CEC as they can be removed from the office on the recommendation of the CEC. This implies that only the CEC discharges his duties without fear and other ECs will depend on the recommendations of one man only, viz. the CEC. He further added that, "...however responsible he (CEC) may be it seems to me very undesirable that the removal of his colleagues who will occupy positions as responsible as those of judges of the Supreme Court should depend on the opinion of one man" (Constituent Assembly Debate, 1989:921).

He also expressed his concern over the appointment of CEC and other ECs by the President. He felt, by giving large powers in the hands of President in the appointment of members of Election Commission, we are leaving

room for a great deal of executive influence in these aspects. As all appointments by the President are done on the advice of the Prime Minister and in case Prime Minister suggests for an appointment of a party man, the President cannot reject it. Thus, he demanded for the modifications in the draft to ensure independence of Election Commission.

While responding to these criticisms raised by members, B.R. Ambedkar said that, there is no need for any change in the process of removal of either the CEC or other ECs. In case of removal of the CEC, he is placed on the same footing as that of the judges of Supreme Court and with regard to the removal of the other ECs, President has powers to remove them but subjected to a limitation that President can do so only on the advice of the CEC.

CONSTITUTIONAL PROVISIONS

The Constitution of India provides that the Election Commission shall consist of CEC and such other ECs as the President may from time to time decide. The CEC and other ECs are appointed by the President subject to the provisions of any law made by Parliament for the purpose [Art. 324 (2)].

Article 324(5) stated that: Subject to the provisions of any law made by the Parliament, the conditions of service and tenure of office of the ECs and the Regional Commissioners shall be such as the President may by rule determine:

- Provided that CEC shall not be removed from the office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the CEC shall not be varied to his disadvantage after his appointment
- Provided further that any other EC or a RC shall not be removed from office except on the recommendation of the CEC

However, till 1989, the Election Commission consisted of only the CEC. It is only in 1989 for the first time, the Rajiv Gandhi government converted it into multi-member commission. When government found CEC Peri Sastri acting too independently, the government decided to add two members to the Election Commission. It was only when the V.P. Singh government came to power in December 1989 that the two additional ECs were removed. On 7th October 1989, President in exercise of the powers conferred by Article 324 (2) of the Constitution issued notification for creating two posts of Election Commissioners.

President appointed S.S. Dhanoa and V.S. Seigell as Election Commissioners. On 1st January 1990, in exercise of the powers conferred under Article 324(2) of the Constitution, the President issued two notifications - one rescinding, with immediate effect, the notification of 7th October, 1989 creating the two posts of Election Commissioners and another rescinding with immediate effect, the notification of 16th October, 1989 by which the appointment of the petitioner and V.S. Seigell was made (SCI, 1991).

S. S. Dhanoa v. Union of India Case (1991)

S.S. Dhanoa filed a writ petition in the Supreme Court challenging the legality of the notifications dated 1st January 1990. The petition contained that "(a) the abolition of the posts of Election Commissioner and their consequent removal tampered with the independence of the Election Commission directly or indirectly, (b) in view of the service rules made by the President the Election Commissioners were entitled to continue in office for full tenure of five years or until they attained the age of 65 years whichever was earlier; (c) the notification abolishing the two posts and removing the petitioner and the other Election Commissioners were issued mala fide under the advice of the Chief Election Commissioner" (SCI, 1991).

While dismissing the petition, the Supreme Court of India held that:

The salient features of the composition of the Election Commission as given in Article 324 are that the Commission shall always consist of a permanent incumbent, viz. the Chief Election Commissioner. But the President has also been given the power to appoint such number of other Election Commissioners as he may from time to time fix. While the appointment of the Chief Election Commissioner is a must, the appointment of the other Election Commissioner or Commissioners is no obligatory. The number of other Election Commissioners is left to the discretion of the President depending upon the need felt from time to time (SCI, 1991).

The Supreme Court has also made it very clear that in matters of conditions of service and tenure of office of the CEC and Election Commissioners, a distinction is made. The protections which are available to the CEC are not available to the other Election

Commissioners. Their conditions of service are also varied even to the disadvantage of the Election Commissioners. They can be removed on the recommendations of the CEC.

In the *S.S. Dhanoa v. Union of India* (1991) case, the Supreme Court held that other Election Commissioners cannot be placed equal to the CEC in terms of power and authority. The court dismissed the petition of S.S. Dhanoa which challenged his removal. The Court also held that the removal of the two Election Commissioners was not permanent termination of service but it was a case of the abolition of the posts which led to termination of post and service. And termination of service cannot be challenged on ground of illegality. The Court also stated that the protection available to the CEC is not available to other Election Commissioners or Regional Commissioners. The Court also observed that "when an institution like the Election Commission is entrusted with vital functions and is armed with exclusive and uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however, wise he may be. It all conforms to tenets of democratic rule" (SCI, 1991). This prompted the government to make the Election Commission a multi-member commission.

Multi-member Commission

On October 2, 1993, the government issued an ordinance which is now an act to convert the one-man Election Commission into a multi-member commission. The ordinance provided for the appointment of two more persons as Election Commissioners and the decision of three members of the commission should be as far as possible unanimous. However, in case of differences of opinion among the members, the matter should be decided on majority. The ordinance also equated the two Election Commissioners with the Chief Election Commissioner with respect to salary and other matters of service.

The decision to make the Election Commission a multi-member one was made by the government in the wake of certain controversial decisions taken by the Chief Election Commissioner T.N. Seshan which created serious confrontations between the Election Commission and the Government in August 1993. The CEC T.N. Seshan had challenged the validity of the ordinance and the act on the ground that it was arbitrary, unconstitutional and void. He also alleged that because of his insistence on strict compliance with model code of conduct by all political parties and strict actions, the ruling party at the Centre was unhappy with him;

therefore in order to curtail his powers, the act was enacted. He argued that they are inconsistent with the scheme of Art. 324 and did not give power to the Parliament to frame rules for transaction of business of the Election Commission. For him, Section 10 of the Act, which provides that the Election Commission will take decisions according to the opinion of the majority is unworkable.

In a significant judgement of T.N. Seshan v. Union of India (1995), five-judge constitution bench of Supreme Court unanimously upheld the validity of the Act equating the status, power and authority of the two Election Commissioners with that of the Chief Election Commissioner. The Court rejected Seshan's argument and held that CEC does not enjoy the status superior to other ECs. Although there are differences between the service conditions of the CEC and other ECs, the CEC can be removed from his office in the like manner and on the like grounds as a judge of the Supreme Court, while the conditions of service cannot be varied to the disadvantage of the CEC after his appointment, the other ECs can be removed on the recommendation of the CEC, but that is not an indication for conferring a higher status upon CEC. Similar views were expressed by Ambedkar while reading the draft article. He said:

If the object of this house is that all matters relating to the Elections should be outside the control of the Executive Government of the day, it is absolutely necessary that the new machinery which we are setting up, namely, the Election Commission should be irremovable by the executive by a mere *fiat*. We have therefore given the Chief Election Commissioner the same status so far as removability is concerned as we have given to the Judges of the Supreme Court. We of course, do not propose to give the same status to the other members of the Commission. We have left the matter to the President as to the circumstances under which he would deem fit to remove any other member of the Election Commission, subject to one condition that the Chief Election Commissioner must recommend that the removal is just and proper (CA Debates, 1989, 504).

Some hints that the Election Commission of India is coming under the influence of the executives were pointed out way back in 1975 by the Tarkunde Committee. Since then, various committees appointed for electoral reforms pointed out that independence and impartiality of the

Election Commission of India will be ensured by bringing reform in the appointment of the CEC. The issue of ensuring independence of Election Commission was also dealt with in the report of the Tarkunde Committee (1975) and the Goswami Committee (1990). A committee was appointed in 1974 under the chairmanship of V.M. Tarkunde to consider electoral reforms which submitted its report in 1975. The Tarkunde Committee's Report (1975) said:

As in the case of Judiciary, the Election Commission must not only be independent in theory but also manifestly appear to be so in the exercise of its powers of organising and conducting elections. In the recent years, an impression is gaining ground that the Election Commission is becoming less and less independent of the Executive than in the earlier years of Independence, because the choice of the Chief Election Commissioner has not always been based on criteria, which would command the confidence of all sections of public opinion. The practice of making it a berth for retiring Government officials has, perhaps, been responsible for the feeling that the incumbent so benefitted will be beholden to the Government for his office (The Hindu, 2001).

Tarkunde Committee recommended that the members of the Election Commission should be appointed by the President but based on the advice given by a Committee which should consist of the Prime Minister, the leader of the opposition in the Lok Sabha, and the Chief Justice of India. On the eve of retirement of CEC S. L. Shaktidar, in 1982 the leaders of the Janata Party, the BJP, the Lok Dal, the CPI (M) and the CPI in a hurriedly called meeting issued a joint statement demanding appointment of a successor after consultation with opposition parties. But the incumbent government did not do so.

In 1990, the V.P. Singh government appointed a Committee on Electoral Reforms under the Chairmanship of Dinesh Goswami. The Dinesh Goswami Committee recommended that the CEC should be appointed by the President in consultation with the Chief Justice of India and the leader of the opposition and that the other two Election Commissioners should be appointed in consultation with the CEC. Thus both Tarkunde and Goswami committees recommended making the appoints to the Election Commission free of executive control.

What we could also infer from the above discussion is the idea of making

Election Commission a multi-member commission is also the result of tension between the CEC and the central government. In recent years, it is increasingly being realised that the Election Commission is becoming less independent of the executive, mainly for the reason that the choice of the CEC is seen as done on partisan basis. On the eve of 9th Lok Sabha elections appointment of two Election Commissioners by the government was seen as an attempt by the ruling party to influence the decisions of the Election Commission. This suspicion got strengthened when it promptly ordered the DMK Government in Tamil Nadu to desist from screening documentaries on its achievements in the last one year and the Andhra Pradesh Government to remove cutouts of N.T. Rama Rao, depicting him as Krishna, but took its time in dealing with the complaint made by the non-Congress (I) Parties against the announcement of the Indira Mahila Yojana by the Congress (I) President who was also the Prime Minister (B.L. Fadia, 1992: 86).

In *S. Dhanoa v. Union of India* case, the court held that the other ECs are removed on the recommendation of the CEC, and provides protection to them, also limits the interference of executive in the matters of Election Commission. The Election Commission was made into multi-member commission to avoid the control of one person over such an important institution. But by giving the CEC power in removal of other ECs, once again the government is allowing control of one person over the decisions of the institution.

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