

Partisan appointment of Election Commission in India

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In December 2023, the Government of India enacted the *Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act 2023*, which reformed the process through which members of Election Commission of India (ECI) are appointed. Given the extensive powers given to the Election Commission of India in conducting elections, the law has raised concerns about free and fair elections in India.

The Constitution of India stipulates formation of an ECI [1] as an autonomous, permanent, constitutional body responsible for the administration of Union and State elections in India [2]. The ECI is mandated to oversee the entire election process, and has powers to delimit constituencies, register and maintain electoral rolls, register and designate parties and their emblems, and oversee the election campaigns and process of elections across India in a non-partisan, independent manner [3; 4]. For a free and fair election, and in absence of any other regulatory ombudsman body, the ECI must ensure impartiality and fairness in all its procedures.

The Constitution of India stipulates the appointment of the ECI through an act of parliament. It is a fair expectation from the largest democracy in the world that any such act of parliament in form of a legislation adheres to the principles of natural justice and fairness.

However, the December 2023 amendment to the procedures for appointing the Chief Election Commissioner (CEC), and the Election Commissioners (EC) allows the Prime Minister potentially two votes out of three for nominating candidates for appointment as CEC and EC: The new amendment states that the three-person committee would consist of (a) Prime Minister (b) Member of the opposition (c) a Cabinet minister nominated by the Prime Minister [5]. This formation of the nomination committee imparts partisan character to the appointment of the CEC and ECs, making the process open to unfairness.

Mandate of the ECI

Under the official mandate, the office bearers of the ECI – the Chief Election Commission and the Election Commissioners – are tasked with [6]:

- **determining territorial areas of electoral constituencies** throughout the country, on the basis of the Delimitation Commission Act of Parliament;
- **periodically revising electoral rolls** and registering all eligible voters;
- **notifying the date of elections** and setting up the polling station, ensuring sufficient infrastructure for polling is available to citizens;
- **scrutinizing the nomination papers** of contestants;
- **timely recognizing political parties**, allocating them election symbols and determining their national, regional or local party status;
- **settling disputes** concerning party symbols and names;
- **determining the code of conduct to be followed** by the political parties and candidates during elections;
- **setting limits on the campaign expenditure** of every candidate and monitoring the spending.
- advising the President of India (or governor, as applicable) on matters concerning the **disqualification of elected members**;
- **canceling and/or initiating re-conduct of polls** in case of booth capturing, rigging, violence, and other irregularities;
- advising the President of India on the **feasibility of holding elections** in a state that is **under the President's rule**, in order to extend the period of emergency after 1 year.

The powers vested in the ECI through the Constitution is supplemented by the Representation of People Act, 1951 (RoPA), which provides details of the conduct of elections to the Houses of the Parliament and the State Legislature. RoPA delineates corrupt practices by candidates, agents, and/or any person with consent of candidate or agent, and delineates electoral offences by any person connected to the election [7].

The Model Code of Conduct (MCC) builds on the RoPA and provides a set of guidelines for standards of conduct during the election campaign and polling. The ECI enforces the MCC for election campaigns and ensures its implementation [8]. While the MCC is not a law, violating the MCC has consequences. For example, complaints can be reported to Election Commission observers, and the ECI may give directions to address violations [9]. When the violation falls within the ambit of RoPA, the ECI may issue warnings, fines, and disqualify candidates. When the violation falls within the ambit of the Indian Penal Code, the ECI may also initiate criminal proceedings [10].

Both the RoPA and the MCC form the main guidance on the conduct of elections in India by the ECI.

Specific ways in which the ECI can regulate elections

The ECI regulates political advertisements. For instance, the ECI must ensure that political advertising does not include criticism of the personal lives of political candidates and party workers [11]. Further, the ECI must initiate criminal proceedings in the case of false statements made or published about the character or conduct of candidate to affect the result of the elections, that the person knows to be false [12].

Concerns: As the ECI has ultimate authority on determining the validity of these complaints and initiating proceedings, it is possible that a partisan EC may choose not to initiate any criminal proceedings against political parties that are responsible for the ECI's appointment.

The ECI is mandated to prohibit advertisements based on religion. Under the RoPA, appeals to people to vote or refrain from voting for any person on the ground of his religion - including through use of religious symbols/race/caste/community/language etc. - is considered a corrupt practice [13]. If political candidates do so, a voter or another candidates can file an election petition against the candidate [14]. The ECI must ensure that parties' or candidates' activities do not aggravate existing differences between religious or linguistic castes and communities [15]. Finally, the ECI can initiate criminal proceedings in cases of persons promoting enmity between classes in connection with elections.

Concerns: If the ECI is biased, it has the potential of leading to a more polarized electorate, as the ECI may ignore religious advertisements and choose to not act against the offending party.

The ECI regulates campaigning on social media. The MCC requires that candidates give information about their authentic social media accounts to the ECI. The ECI also requires that all advertisements in electronic media, including social media, be pre-certified prior to publication. The ECI must be given all accounts of expenditure on social media campaigns [16].

Concerns: A biased ECI may not uniformly and neutrally enforce the prohibition of religious content and criticism of personal lives in political advertising. A biased ECI may choose to ignore or use different calculations to determine if social media campaigning expenditure exceeds the limits it has imposed for the ruling party.

The ECI enforces the election silence period. All political campaigning, such as public meetings or processions or advertisements on television etc., are prohibited for 48 hours before voting starts. Violating this moratorium on campaigning is an electoral offence and is punishable with imprisonment for two years or with fine or both [17].

Concerns: A biased ECI may not initiate criminal proceedings if this moratorium is violated, which therefore gives an advantage to the ruling party.

The ECI enforces the maximum election expenses. The ECI has fixed "maximum election expenses" for individual candidates [18]. In 2022, the ECI increased the expenditure limit for Lok Sabha candidates from INR 5,400,000 - 7,000,000 (depending on states) to INR 7,000,000 - 95,000,000 [19]. The ECI must declare any person who has failed to disclose their election expenses as disqualified from standing for election for three years [20].

Concerns: A biased ECI may ignore the election expenditure by particular candidates, giving a significant advantage and preventing a level playing field for all candidates, thereby impacting the fairness of the elections.

Reform in appointment to the ECI

The previous Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act, 1991 did not have a clause related to the appointment of the CECs and the EC. In 2015, the Supreme Court of India had held in WP(Civil) No.104/2015 [21] that the President of India should appoint ECI members based on the advice of a committee comprising:

- a) the Prime Minister,
- b) the Leader of the Opposition, and
- c) the Chief Justice of India.

However, the recently enacted "Chief Election Commissioner and other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act 2023" substituted the Chief Justice of India with a Minister nominated by the Prime Minister. **This law violates the spirit of natural justice and fairness, and allows the ruling party favorable positioning in the appointment of the officers in charge of election affairs.**

Section 7(1) of the Act states that 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 [22].

The party in power therefore has a 2/3 vote in the Selection Committee to appoint Election Commissioners, in violation of the basic tenets of ensuring independence and non-partisanship of the ECI.

Section 7(2) states that the appointment of Chief Election Commissioner and other Election Commissioners "shall not be invalid" in case of "any vacancy in or any defect in the constitution of the Selection Committee" [23].

The Act therefore defaults on due process in the appointment process. Even if the post of opposition leader representative in the selection committee is vacant, the appointments can still go ahead. This has led to significant concerns about the independence of the procedure and its impact on free and fair elections.

Section 8(1) of the Act states that the Selection Committee is required to "regulate its own procedure in a transparent manner for selecting the Chief Election Commissioner or other Election Commissioners" [24].

However, the Act does not provide guidance on what these procedures may be, other than requiring transparency. Given the lack of clarity about the procedure to be adopted by the Selection Committee, the party in power can use its majority to make the selection. The ruling party can also impair the spirit of bipartisan agreement in the selection process, for instance by not giving adequate notice to the opposition about the members nominated.

Search Committee now under jurisdiction of the Law Minister

According to Section 6, the initial pool of candidates from which the Selection Committee may appoint Election Commissioners is decided by a Search Committee, which is headed by the Minister of Law and Justice. Section 6 specifies that “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 [...]” [25].

This gives disproportionate powers to the ruling party in government, as the Minister serves under the Prime Minister, and further curtails independence.

Chief Election Commissioner may remove other ECs

Under Section 11, the “other Election Commissioners shall not be removed from office except on the recommendation of the Chief Election Commissioner” [26]. This gives significant power to the CEC, who may in practice be appointed de facto by the ruling party in government, to remove other ECs.

This also raises serious concerns about the independence and impartiality of India’s future Election Commissions.

References

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