

THE ELECTION COMMISSION OF INDIA CANNOT BE A SUPER GOVERNMENT

Relevant for: Indian Polity | Topic: Elections, Election Commission and the Electoral Reforms in India Incl. Political Parties

Elections bring the Election Commission of India (ECI) into sharp focus as this constitutional body superintends, directs and controls the conduct of elections. It is the constitutional duty of the ECI to ensure that the elections held are free and fair.

It is an interesting aspect of the ECI's history that before [T.N. Seshan](#) came on the scene as the Chief Election Commissioner, no one in the country ever knew or felt that the ECI had any powers. Seshan discovered the ECI's powers hidden in [Article 324 of the Constitution](#) which was then used to discipline recalcitrant political parties which had till then believed that it was their birth right to rig elections. Thus there was a very high level of confidence in the minds of Indian citizens about the ECI's role restoring the purity of the elected legislative bodies in the country.

It became rather easier for Seshan to locate the powers of the ECI after the Supreme Court held in [Mohinder Singh Gill vs Chief Election Commissioner](#) (AIR 1978 SC 851) that Article 324 contains plenary powers to ensure free and fair elections and these are vested in the ECI which can take all necessary steps to achieve this constitutional object. All subsequent decisions of the Supreme Court reaffirmed Gill's decision and thus the ECI was fortified by these court decisions in taking tough measures.

The [model code of conduct issued by the ECI](#) is a set of guidelines meant for political parties, candidates and governments to adhere to during an election. This code is based on consensus among political parties. Its origin can be traced to a code of conduct for political parties prepared by the Kerala government in 1960 for the Assembly elections. It was adopted and refined and enlarged by the ECI in later years, and was enforced strictly from 1991 onwards.

There is absolutely no doubt that elections need to be properly and effectively regulated. The Constitution has clothed the ECI with enough powers to do that. Thus, the code has been issued in exercise of its powers under Article 324. Besides the code, the ECI issues from time to time directions, instructions and clarifications on a host of issues which crop up in the course of an election. The model code is observed by all stakeholders for fear of action by the ECI. However, there exists a considerable amount of confusion about the extent and nature of the powers which are available to the ECI in enforcing the code as well as its other decisions in relation to an election.

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Since it is a code of conduct framed on the basis of a consensus among political parties, it has not been given any legal backing. Although a committee of Parliament recommended that the code should be made a part of the Representation of the People Act 1951, the ECI did not agree to it on the ground that once it becomes a part of law, all matters connected with the enforcement of the code will be taken to court, which would delay elections.

The position taken by the ECI is sound from a practical point of view. But then the question about the enforceability of the code remains unresolved. Paragraph 16A of the [Election Symbols \(Reservation and Allotment\) Order, 1968](#) says that the commission may suspend or withdraw recognition of a recognised political party if it refuses to observe the model code of conduct.

But it is doubtful whether this provision is legally sustainable. The reason is that withdrawal of the recognition of a party recognised under these orders seriously affects the functioning of political parties. When the code is legally not enforceable, how can the ECI resort to a punitive action such as withdrawal of recognition?

There are two crucial issues which need to be examined in the context of the model code and the exercise of powers by the ECI under Article 324.

One issue relates to the abrupt transfer of senior officials working under State governments by an order of the commission. It may be that the observers of the ECI report to it about the conduct of certain officials of the States where elections are to be held. The ECI apparently acts on such reports and orders the transfer on the assumption that the presence of those officials will adversely affect the free and fair election in that State. Transfer of an official is within the exclusive jurisdiction of the government. It is actually not clear whether the ECI can transfer a State government official in exercise of the general powers under Article 324 or under the model code.

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The code does not say what the ECI can do; it contains only guidelines for the candidates, political parties and the governments. Further, Article 324 does not confer untrammelled powers on the ECI to do anything in connection with the elections. If transfer of officials is a power which the ECI can exercise without the concurrence of the State governments, the whole State administration could come to a grinding halt. The ECI may transfer even the Chief Secretary or the head of the police force in the State abruptly. In Mohinder Singh Gill's case (*supra*), the Court had made it abundantly clear that the ECI can draw power from Article 324 only when no law exists which governs a particular matter. It means that the ECI is bound to act in accordance with the law in force. Transfer of officials, etc is governed by rules made under Article 309 of the Constitution which cannot be bypassed by the ECI under the purported exercise of power conferred by Article 324. Further, to assume that a police officer or a civil servant will be able to swing the election in favour of the ruling party is extremely unrealistic and naive. It reflects in a way the ECI's lack of confidence in the efficacy of politicians' campaigns.

Another issue relates to the ECI's intervention in the administrative decisions of a State government or even the union government. According to the model code, Ministers cannot announce any financial grants in any form, make any promise of construction of roads, provision of drinking water facilities, etc or make any *ad hoc* appointments in the government departments or public undertakings. These are the core guidelines relating to the government. But in reality, no government is allowed by the ECI to take any action, administrative or otherwise, if the ECI believes that such actions or decisions will affect free and fair elections.

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A recent decision of the ECI to stop the Government of Kerala from continuing to supply kits containing rice, pulses, cooking oil, etc is a case in point. The State government has been distributing such free kits for nearly a year to meet the situation arising out of the pandemic, which has helped many a household. The decision to stop the kit distribution was reportedly on a complaint from the Leader of the Opposition in the Assembly. The question is whether the ECI could have taken such a decision either under the model code or Article 324. The model code does not provide any clue. As regards the use of Article 324, the issue boils down to whether distribution of food items to those in need in a pandemic will affect free and fair elections.

The Supreme Court had in [S. Subramaniam Balaji vs Govt. of T. Nadu & Ors \(2013\)](#) held that

the distribution of colour TVs, computers, cycles, goats, cows, etc, done or promised by the government is in the nature of welfare measures and is in accordance with the directive principles of state policy, and therefore it is permissible during an election. If colour TVs, computers, etc can be promised or distributed during an election and it does not influence the free choice of the people, how can the distribution of essential food articles which are used to stave off starvation be an electoral malpractice? Further, Section 123 (2)(b) of the Representation of the People Act, 1951 says that declaration of a public policy or the exercise of a legal right will not be regarded as interfering with the free exercise of the electoral right.

There is no doubt that the ECI, through the conduct of free and fair elections in an extremely complex country, has restored the purity of the legislative bodies. However, no constitutional body is vested with unguided and absolute powers. Neither citizens nor the ECI is permitted to assume that the ECI has unlimited and arbitrary powers. It would be useful to remember the insightful words of Justice S.M. Fazalali, in [A.C. Jose vs Sivan Pillai](#) (1984): “if the [Election] Commission is armed with such unlimited and arbitrary powers and if it ever happens that the persons manning the commission shares or is wedded to a particular ideology, he could by giving odd directions cause a political havoc or bring about a constitutional crisis, setting at naught the integrity and independence of the electoral process so important and indispensable to the democratic system.”

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