

The Bill on Appointment of the Election Commissioners

The government recently introduced the Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023. Many provisions of the Bill run counter to the idea of the Commission functioning as an authority independent of the political executive, as envisaged by the framers of the Constitution. Considering that free and fair elections constitute the foundation of our democracy, the Bill if enacted is likely to render the Commission vulnerable to the executive's control and therefore it will erode the trust that the public reposes in the Commission.

On June 15, 1949, when the Constituent Assembly discussed the provisions included in the draft of the Constitution for setting up an independent Election Commission, Dr B R Ambedkar explained the background as follows:

*“in a very early stage in the proceedings of the Constituent Assembly, a Committee was appointed to deal with what are called Fundamental Rights. That Committee made a report that it should be recognised that the independence of the elections and the avoidance of any interference by the executive in the elections to the Legislature should be regarded as a fundamental right and provided for in the chapter dealing with Fundamental Rights. When the matter came up before the House, it was the wish of the House that while there was no objection to regard this matter as of fundamental importance, it should be provided for in some other part of the Constitution and not in the Chapter dealing with Fundamental Rights. But the House affirmed without any kind of dissent that in the interests of purity and freedom of elections to the legislative bodies, it was of the utmost importance that they should be freed from any kind of interference from the executive of the day. In pursuance of the decision of the House, the Drafting Committee removed this question from the category of Fundamental Rights and put it in a separate part containing articles 289, 290 and so on. Therefore, so far as **the fundamental question is concerned that the election machinery should be outside the control of the executive Government, there has been no dispute.***

What Article 289 does is to carry out that part of the decision of the Constituent Assembly. It transfers the superintendence, direction and control of the preparation of the electoral rolls and of all elections to Parliament and the Legislatures of States to a body outside the executive to be called the Election Commission”

The primary intent underlying the provisions in the Constitution, as later approved by the Constituent Assembly, was thus based on the fundamental premise that the Election Commission should be outside the control of the executive, as any element of influence by the executive would result in an authority that would fail to inspire sufficient confidence among the political parties and the public in the impartiality of the Commission and its ability to hold elections in a free and fair manner.

The existing system of appointment of the Election Commissioner is based on the executive considering a panel of candidates and selecting one considered acceptable from its point of view, for approval by the President. As a result, there have been complaints from several political parties about the Commission's independence as an authority constituted under Article 324 and its effectiveness in functioning as an apolitical body capable of conducting elections in a fair manner.

For example, Shri L K Advani, in a letter of June 2, 2012, addressed to the then Prime Minister, Dr Manmohan Singh, questioned the credibility of the existing system in which the members of the Commission were appointed by the President solely on the advice of the Prime Minister. He said that it would not “*evoke confidence among the people*”. He therefore proposed that the committee that selects candidates for appointment to the Commission should be more “broad-based” to include the Leader of Opposition and the Chief Justice of India, among others as members.

More recently, the Supreme Court, in WP(Civil) NO.104 OF 2015, pronounced an order on March 2, 2023 directing the government to consider introducing a more transparent system of appointment of the Election Commissioners and made the following observations:

“keeping in view the importance of maintaining the neutrality and independence of the office of the Election Commission to hold free and fair election which is a sine qua non for upholding the democracy as enshrined in our Constitution, it becomes imperative to shield the appointment of Election Commissioners and to be insulated from the executive interference. It is the need of the

hour and advisable, in my view, to extend the protection available to the Chief Election Commissioner under the first proviso to Article 324(5) to other Election Commissioners as well until any law is being framed by the Parliament.

We declare that the appointment of the Chief Election Commissioner and the Election Commissioners shall be made on the recommendations made by a three-member Committee comprising of the Prime Minister, Leader of the Opposition of the Lok Sabha and in case no Leader of Opposition is available, the Leader of the largest opposition party in the Lok Sabha in terms of numerical strength and the Chief Justice of India.

It is desirable that the grounds of removal of the Election Commissioners shall be the same as that of the Chief Election Commissioner that is on the like grounds as a Judge of the Supreme Court subject to the “recommendation of the Chief Election Commissioner” as provided under the second proviso to Article 324(5) of the Constitution of India.

The conditions of service of the Election Commissioners shall not be varied to his disadvantage after appointment”

Apparently, it is in pursuance of the above observations of the apex court, that the government has introduced the present Bill in Parliament.

Section 7 of the Bill seeks to set up a Selection Committee headed by the Prime Minister to select candidates to be appointed as Election Commissioners. While the proposed committee includes the leader of the largest party in opposition and a Union Minister to be nominated by the Prime Minister as members, it does not include anyone else, including either the Chief Justice of India or his nominee.

Section 6 provides for a Search Committee headed by the Cabinet Secretary with two other Secretaries as its members. The Search Committee would consider candidates eligible to be appointed as Election Commissioners and recommend a panel of five such candidates for the Selection Committee's consideration.

The salutary provisions of the Bill include a fixed term for each Election Commissioner [Section

9(1)], prohibition of an Election Commissioner being reappointed [Section 9(2)] and a rigorous and transparent procedure for the removal of a Chief Election Commissioner, as envisaged in Article 324(5) of the Constitution [Section 11(2)].

However, there are other provisions that cause serious concern. The Bill in its present form fails to meet the requirement that Dr Ambedkar had specifically referred to during the debate on the subject by the Constituent Assembly, namely, “*that the election machinery should be outside the control of the executive Government*”, as explained below.

The Selection Committee referred in the Bill, as provided in Section 7 is dominated by the representatives of the political executive and the mere presence of the leader of the largest party in opposition would not evidently alter that position.

The Search Committee itself is dominated by civil servants who are under the administrative control of the political executive and the procedure adopted by it for considering eligible candidates to be included in the panel remains totally non-transparent.

Section 8(2) empowers the Selection Committee to “*consider any other person than those included in the panel by the Search Committee*”. Considering that Section 5 provides that candidates for appointment to the office of the Election Commission “*shall be persons of integrity, who have knowledge of and experience in management and conduct of elections*”, the term “*integrity*” not having been defined adequately, it permits the Selection Committee to override the panel recommended by the Search Committee and select any other officer of its choice. The leader of the largest party in opposition, as its member, would not have enough access to the background information on the candidates and, in any case, can be overruled by the rest of the members who are a part of the political executive.

While the procedure prescribed in the Bill for removal of the incumbent of the office of the Chief Election Commissioner, as provided in Section 11(2) of the Bill, is no doubt rigorous enough, as provided in Article 324(5), that Article itself does not explicitly lay down a similar procedure for removing the other Election Commissioners. From the point of view of ensuring the independence of the Election Commission, though not explicitly stated, the intention underlying Article 324(5) should be deemed to be a similar procedure being adopted for the removal of the other Election

Commissioners. Against the background of the discussions in the Constituent Assembly and the overarching objective of ensuring the independence of the Commission, the Bill ought to have explicitly extended a similar procedure of the removal for the other Election Commissioners. This assumes utmost importance in view of the provision in Section 17(2) which states, “*if the Chief Election Commissioner and other Election Commissioners differ in opinion on any matter, such matter shall be decided according to the opinion of the majority*”. Considering that the other Election Commissioners can be removed at the pleasure of the political executive, the mere fact that the procedure for removing the Chief Election Commissioner is rigorous does not confer sufficient autonomy on the Commission as a whole.

Since the procedure of the appointment of an Election Commissioner in the first instance is such that the political executive has an overriding role in it and since the appointment itself constitutes a post-retirement benefit conferred on selected candidates, the independence of the Commission as a whole stands compromised. Thus, the other political parties and the public perceive the Commission as subservient to the political executive.

Even though Article 324(5) of the Constitution indirectly treats the Chief Election Commissioner's status as equivalent to that of a judge of the Supreme Court, Section 10 of the Bill downgrades his/her status and that of the other Commissioners to that of the Cabinet Secretary. To some extent, this provision indirectly diminishes the stature of the Commission.

To sum up, the Bill in its present form does not do sufficient justice to the Constituent Assembly's vision that the “***election machinery should be outside the control of the executive Government***” as the foundation of a healthy, vibrant democracy. An Election Commission that is pliant to the political executive will erode the credibility of India's democracy. In order to uphold the integrity of the Election Commission, the following legislative measures should be taken.

1. Section 7 of the Bill should be modified to enlarge its composition to include the Chief Justice of India (CJI) as one of its members, as suggested by the apex court, as a part of the interim arrangement, in their order of March 2, 2023 and, in addition, further include a few eminent jurists to be suggested by the CJI.
2. The status of the members of the ECI should be elevated to that of a judge of the Supreme

Court. Section 10 of the Bill should be appropriately amended for this.

3. The procedure for the removal of the Election Commissioners should be such that they cannot be removed from their office except in a manner similar to that for the Chief Election Commissioner, that is, that applicable to a Judge of the Supreme Court. This needs to be explicitly stated in Section 11(2).
4. Considering that the Search Committee, as provided in Section 6, consists exclusively of Secretaries to the Government who are under the administrative control of the political executive, in order to render the search process more transparent, the details of the candidates considered by the Search Committee for inclusion in the panel and the eligibility criteria on the basis of which their candidature was taken into account should be placed before the Selection Committee and also in the public domain for the political parties and the public to see. Section 6 needs to be amended to take this into account.
5. Section 8(2) which empowers the Selection Committee to consider persons other than those included in the panel should be suitably amended to require the Selection Committee to spell out the grounds for it. Section 8(2) should be further amended to require the proceedings of the Selection Committee to be placed in the public domain. The proceedings should specifically reflect the dissenting views of individual members.
6. Section 17(2) should be amended to require the ECI to place in the public domain the proceedings of the decisions taken, including the dissenting views of individual members