

## **Challenges to Fair Elections: Evaluating the Independence of India's Election Commission amidst Legislative Changes**

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On 10 August 2023, the Union Government of India introduced an amendment bill to amend the law regarding the appointment of the Chief Election Commissioner (CEC) and other Election Commissioners (ECs) along with the conditions of their service and term of office. When this bill was introduced in Rajya Saba (the lower house of the Indian legislature), the opposition started criticising the amendment bill as the Union Government's excuse to control the Election Commission of India (ECI), which is an independent body according to the Indian Constitution.<sup>1</sup> This news became very popular with the public because the Supreme Court of India (SCI) gave a ruling about this case that until the parliament made the law, the collective body is comprised of three key individuals: the Prime Minister, leader of the opposition, and Chief Justice of the Supreme Court will appoint the CEC and other ECs. According to the new amendment bill, the committee that will nominate the CEC and other ECs will comprise the Prime Minister, the opposition leader, and one of the union cabinet ministers. This raises several concerns because the Chief Justice is not included in the appointing committee of the CEC and ECs in the new amendment bill. According to some policymakers, this amendment bill is against the Supreme Court judgment, while others contend that it is against the Constitution as it bears the potential to compromise the independence of the ECI.

### **Retrospective Analysis of the Constitutional Procedure and Amendment for Appointing the CEC and other ECs**

According to the Indian Constitution, the president is empowered to appoint the CEC and other ECs until the parliament makes a proper law for their appointment. Article 324 Clause 2 of the Constitution stipulates:

"The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of

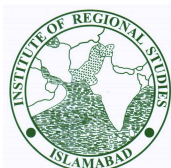
any law made in that behalf by Parliament be made by the President."<sup>2</sup>

It is questionable however that, when the President belongs to a certain political party, which has a government at the federal level he may appoint a favourable person as the CEC or EC necessitating a law which defines the independent appointment of CEC and other ECs. Another noteworthy factor is the condition and services of the CEC and other ECs according to Article 324 clause 5 which states:

"Subject to the provisions of any law made by Parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine: Provided that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a Judge of the Supreme Court and the conditions of service of the Chief Election Commissioner 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."<sup>3</sup>

The Indian electoral process has been shaped by a constitutional framework rooted in history. However, an in-depth analysis of the country's electoral journey reveals the need for continuous adaptation and transformation. To comprehend this evolution, it is imperative to undertake a comprehensive analysis of previous significant amendments.

In 1990 Goswami committee was made for the independent procedure of the appointment of a CEC and other ECs. Goswami committee gave some suggestions which were that the President was to appoint the CEC and other ECs in consultation with the Chief Justice and leader of opposition in the Lok Sabha or leader of the largest party in Lok Sabha. The appointment of other ECs was to be carried out by the President in consultation with the Chief Justice, leader of opposition in Lok Sabha, or leader of the largest party in Lok Sabha and CEC.<sup>4</sup>



In 2002, a report was presented after reviewing the constitution. According to the report, the Chief Election Commissioner and other Election Commissioners were to be appointed by a committee comprising of the Prime Minister of India, the Opposition Leader in Lok Sabha, the Opposition Leader in Rajya Sabha, Lok Sabha Speaker, and the Deputy Chairman of Rajya Sabha.<sup>5</sup>

According to the 255th Law Commission Report, the appointment committee of the CEC and other ECs shall consist of the Prime Minister of India, the leader of the opposition in Lok Sabha (or the largest opposition party leader in Lok Sabha), and the Chief Justice of India.<sup>6</sup>

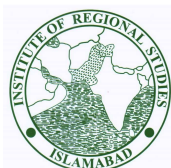
Given the lack of implementation on the provision set forth by the specified commissions and committees, Advocate Anoop Baranwal contends that the current procedure for appointing the CEC and other ECs does not adhere to the provisions set forth in the Constitution. He posits that the appointment of these officials is wholly within the purview of the executive branch, which is not an independent process. As a remedy, he recommends the establishment of an independent committee charged with overseeing the appointment of the CEC and other ECs. Baranwal in this view filed a petition in 2015 in the Supreme Court which raised concerns about the law of appointing the CEC. He argued in the petition that the current procedure of appointing CEC and other ECs is unconstitutional and there must be an independent procedure of appointing the CEC and other ECs. A bench comprising two judges passed the order that the objections of the petitioner were right and that there must be a proper independent system regarding the CEC and other ECs appointment. It referred this situation to the Chief Justice to make a constitutional bench for this. In the writ petitions filed by Ashwani Kumar Upadhyay in 2017 and by the Association for Democratic Reforms in 2021, the Supreme Court benches passed similar rulings and called for a law reflecting independence regarding the CEC and other ECs appointment.<sup>7</sup>

### **Election Commission Amendment Bill 2023**

Despite the ruling of the Supreme Court in March 2023, on 10 Aug 2023, the Union Law Minister, Arjun Ram Meghwal presented the new Chief Election Commissioner and other Election Commissioners (appointment, conditions of service, and term of office) Amendment Bill, 2023, in Rajya Sabha. The following are the main points of the new bill:

- a) The new bill substitutes the Election Commission India Act of 1991.
- b) The new bill is about the CEC and other ECs appointment, salary and their removal.

- c) According to Section 7 of this bill, the appointment of CEC and other ECs will be carried out by the President on the recommendation of a selection committee which includes the Prime Minister of India as chairperson and the leader of the opposition in the House of the People, a union cabinet minister nominated by the Prime Minister as members. Neither the Chief Justice nor any other independent person is included in this Selection Committee. It means that the CEC and other ECs appointments would be carried by the political executive who belongs to the ruling political party because the Leader of the Opposition will either be ignored or overruled.
- d) Section 6 of the bill states that there should be a Searching Committee headed by a Cabinet Secretary with two more secretaries as members. The work of this Searching Committee includes provision of five names to the Selecting Committee who are eligible for the post of CEC and other ECs. While passing the bill from Rajya Sabha on 12 December 2023, the Union Government added another amendment to the bill placing the law minister as the head of the Search Committee instead of the Cabinet Secretary. But the problem is that Section 8 of the bill says that the selection committee can regulate its own procedure and can recommend any other person who is not included in the searching committee panel, to the President to appoint him/her as a CEC or other EC, thus reducing the chances of independence at a very early stage.
- e) According to Section 8(2) of the bill under consideration, the decision therein will remain valid even if the Selection Committee has a vacancy. Specific situations that may lead to such vacancies include the dissolution of the Lok Sabha before elections, resulting in the absence of a Leader of Opposition. The provision in question, however, exposes an important flaw that could compromise the independence of the Election Commission of India (ECI). The potential consequences of such a flaw should not be overlooked, especially in the context of the ECI's responsibility to uphold the integrity of the electoral process.<sup>8</sup>
- f) The Indian Constitution's Article 324(5) designates the Election Commission of India (ECI) as an executive authority rather than a constitutional body. This poses a dilemma considering the 1991 Act, which stipulates that the salaries of the CEC and other ECs are to be commensurate with those of Supreme Court judges. Under Article 125 of the Constitution, the salaries of the Supreme Court judges are established



through an Act of the parliament. Conversely, Section 10 of the new bill has elevated the status of the CEC and ECs to that of the Cabinet Secretary. As per the Constitution, the Cabinet Secretary's salary is set by the executive, thereby potentially enabling the political executive to exert control over the ECI.

On 2 March 2023, a Supreme Court bench comprising five judges, gave a very important verdict that a committee comprising the Prime Minister of India, the opposition leader in Lok Sabha, and the Chief Justice of India will advise the President regarding the appointment of the CEC and other ECs. Some of the important points of the Supreme Court decision are as follows:

"...The basic and underlying principle central to democracy is power to the people through the ballot. Abraham Lincoln declared democracy to be the Government of the people, by the people, and for the people. A political party a group or a coalition assumes reigns of governance. The purpose of achieving power is to run the Government. No doubt, the Government must be run in accordance with the dictate of the Constitution and the laws..."

"...An Election Commission which does not ensure free and fair poll as per the rules of the game guarantees the breakdown of the foundation of the rule of law. Equally, the sterling qualities which we have described which must be possessed by an Election Commission are indispensable for an unquestionable adherence to the guarantee of equality in Article 14.

Regarding the new appointment process, the bench stated:

"The appointment of the Chief Election Commissioner and the Election Commissioners, shall be made by the President on the advice of a Committee consisting of the Prime Minister, the 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. We make it clear that this will be subject to any law to be made by Parliament."<sup>9</sup>

### **Does the ECI Favour the Ruling Party?**

The court was hearing four different petitions related to the CEC and other ECs appointments. Jadgeep Chhokar from the Association for Democratic Reforms in December 2022 argued that the elections were plagued with numerous irregularities that favoured the ruling

party. Specifically, certain categories of voters were deleted from the voter list and there was an uneven application of the model of the code of conduct just before the elections. As the ECI was held responsible for all these issues, it called for an independent procedure regarding the CEC and other ECs appointments. The tenure of ECs was also challenged because for the removal of the CEC, the rules are similar to those of Supreme Court judges but the other ECs can simply be removed on the recommendation of the CEC. The petitioner demanded the court for a separate permanent secretariat for the election commission because the staff required for the election commission was previously provided by the President or a Governor.<sup>10</sup>

The new Election Commission Bill has been conceived to gain electoral benefits by the BJP in the upcoming elections.

As per the Supreme Court's direction to the Union Government to formulate an appropriate law for appointing the CEC and ECs, it is within the purview of Parliament to create specific legislation for particular situations or institutions. The Constitution or the Supreme Court does not prohibit the Parliament from making laws. According to the former, since the Supreme Court directed the Union Government to make a proper law regarding the CEC and other ECs appointments, it is the Parliament's right to make specific laws regarding certain situations or institutions. Neither the Supreme Court nor the Constitution binds or restricts the Parliament in making law. The Union Law Minister Arjun Ram Meghwal in a parliament discussion said that the Election Commission Act 1991 was incomplete in which the issue of appointing the CEC and other ECs was not discussed completely so the new bill seeks to repeal the 1991 Act. He further added that the Supreme Court ruled on 3 March 2023 that a committee comprising the Prime Minister India, the Opposition leader, and the Chief Justice of India will decide on appointment of the CEC and other ECs till the parliament makes a law. He also said that Article 324 of the Constitution asks the same thing.<sup>11</sup>

The bill presents several noteworthy provisions and shortcomings indicating the Union Government's aim to regulate independent institutions, threatening liberal democracy. The bill's various sections demonstrate the BJP's intention to control the ECI, which raises the question of how other executive institutions can maintain their independence under the BJP-led Union Government. Independence of institutions is the key to democracy. This kind of amendment has the potential to derail the democratic process. In a democratic state, institutions are empowered. If a government is restricting or minimising the powers of independent institutions, it is synonymous

to abolishing democratic values and the justice system of the state.

### Impact on Upcoming Election in 2024

Opposition parties claim that this bill will affect the upcoming elections in 2024. They are of the view that the Union Government will appoint a person as the CEC who will manage elections for the ruling party. The Trinamool Congress leader Sushmita Dev termed it yet another attempt to control an institution that must be independent. She further said that the bill is a ploy to rig the 2024 Lok Sabha poll as the BJP is afraid of the Indian National Development Inclusive Alliance (INDIA). Opposition parties are of the view that the CEC and ECs must be appointed independently and this bill is against the Supreme Court judgment issued in March.<sup>12</sup>

### Conclusion

In its March 2023 ruling, the Supreme Court said that independence of the ECI was a pre-requisite of democracy. However, it looks like the Supreme Court will not intervene this time because in its ruling over Article

370 the Supreme Court has delivered a decision relegating the Constitution and all the rules.<sup>13</sup>

On 12 December 2023, the new bill of the election commission was passed by the Rajya Sabha and it will soon be introduced in the Lok Sabha where it is most likely going to be passed. India purports to be the largest democracy in the world. However, the presence of democratic values within the state is paramount. The Supreme Court, in its judgment, highlighted that the fundamental definition of democracy is that it is a government of the people, by the people, and for the people. It is imperative that this fundamental principle governs the functioning of democracy in India. The election process is a fundamental aspect of any democratic society. Any notion that the Prime Minister of India holds sway over the entire election system is a cause for concern. If such a scenario were to transpire, it would raise serious questions about the very nature of democracy and its ability to represent the people's will. The system for the appointment and service conditions of the CEC and other ECs must be independent. Independence of institution is the foundation of democracy in a country.

### Notes and References

- <sup>1</sup> Sravasti Dasgupta, "Umpire Cannot be Subordinate to Team Captain': Election Commissioners Bill Raises Questions," *The Wire*, 15 August 2023. <https://thewire.in/government/umpire-cannot-be-subordinate-to-team-captain>.
- <sup>2</sup> India, Cons, Art 324, Cl 2, <https://legislative.gov.in/constitution-of-india/>.
- <sup>3</sup> India, Cons, Art 324, Cl 5, <https://legislative.gov.in/constitution-of-india/>.
- <sup>4</sup> Committee on electoral reforms, Goswami Committee (1990), <https://adrindia.org/sites/default/files/Dinesh%20Goswami%20Report%20on%20Electoral%20Reforms.pdf>.
- <sup>5</sup> National commission report to review the working of the Constitution (2002), <https://web.archive.org/web/20150405000119/http://lawmin.nic.in/ncrwc/finalreport/v1ch4.htm>.
- <sup>6</sup> Law commission, 255<sup>th</sup> law commission report (2015), <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081635.pdf>.
- <sup>7</sup> Writ Petition (c) No. 104 of 2015, Anoop Baranwal v Union of India, Supreme Court, March 2, 2023, Anoop-BaranwalWP-and-Counter.pdf (scobserver.in).
- <sup>8</sup> The CEC and Other Election Commissioners (Appointment, Conditions of Service and Term Of Office) Bill, 2023, <https://www.indiacode.nic.in/bitstream/123456789/1965/1/A1991-11.pdf>.
- <sup>9</sup> "Salient Sections from SC's Judgment on Appointments to Election Commission," *The Wire*, 3 March 2023, <https://thewire.in/law/read-salient-sections-from-scs-judgment-on-appointments-to-election-commission>.
- <sup>10</sup> Umang Poddar, "Explainer: Why the SC took away the government's discretion to appoint election commissioners," *Scroll*, 3 March 2023, <https://scroll.in/article/1044960/explainer-why-the-sc-took-away-the-governments-discretion-to-appoint-election-commissioners>.
- <sup>11</sup> "Law Minister Arjun Ram Meghwal defends bill to appoint CEC, ECs," *The Economic Times*, 11 August 2023, <https://economictimes.indiatimes.com/news/politics-and-nation/law-minister-arjun-ram-meghwal-defends-bill-to-appoint-cec-ecs/articleshow/102651294.cms>.
- <sup>12</sup> "Congress slams Centre over new Bill on Election Commission members' appointments," *India Today*, 11 August 2023, <https://www.indiatoday.in/programme/india-s-agenda/video/congress-slams-centre-over-new-bill-on-election-commission-members-appointments-2419495-2023-08-11>.
- <sup>13</sup> Supreme court of India, <https://main.sci.gov.in/>.