

Constitutional Law and Public Administration in India

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Constitutional Authorities - II (EC)

Under the Constitution, the Chief Election Commissioner seems to have been put on a higher pedestal when compared to other Election Commissioners. In terms of Chief Election Commissioner's status as the chairman of the Election Commission and also in terms of the safeguards that are provided exclusively to the Chief Election Commissions. On the other hand, the law made by the parliament treats all Election Commissioners and the Chief Election Commissioner on the same footing. There is no difference with respect to their salary or conditions of service or tenure. All of them are treated alike. So, this ambiguity has given birth to a widely debated question. Is the status of Chief Election Commissioner higher than that of other Election Commissioners? One of the first cases that dealt with this question of law was the judgment *S S Dhanoa v. Union of India* which was a judgment of the Supreme Court. So, in this case what happened was that the President had appointed Mr. Dhanoa the petitioner, and another person as the Election Commissioner. So, there were two Election Commissioners in addition to the Chief Election Commissioner who were appointed by the President. Later on, the President issued another notification abolishing the posts of the two Election Commissioners. So, their appointment came to an end. And this abolishing of their appointment was challenged before the Supreme Court.

And the Supreme Court observed that while Election Commissioners envisage to be an independent institution, the power has been vested with the President to appoint as many numbers of Election Commissioners as he decides. So, appointment of Chief Election Commissioner is mandatory while the appointment of other Election Commissioners is only an obligatory provision. The Supreme Court also observed that the Constitution of India purposefully accords a higher protection to Chief Election Commissioner which is not available to other Election Commissioners. And the court went on to observe that Election Commissioners are on a higher pedestal than maybe regional commissioners. But the Chief Election Commissioner is on a higher pedestal than both the Election Commissioners as well as the regional Election Commissioners.

Thus, the court clearly laid down that the Chief Election Commissioner is not a person who is the first among equals, rather he is deliberately put on a higher pedestal than the other Election Commissioners. The matter was again dealt with by the Supreme Court in the case of *T. N. Seshan v. Union of India*. So, in this case the court went on to observe that the protections that are accorded to Chief Election Commissioner did not make him superior to the other Election Commissioners. Those are protections that are given to the Chief Election Commissioner because he is a permanent incumbent. The other Election Commissioners are appointed by the President as and when he deems it necessary. It is not a permanent office. On the other hand, the post of the Chief Election Commissioner is a permanent office. It is a permanent body.

So, the court reasoned that the safeguards regarding irremovability from the office were not given to Election Commissioners because their office is not permanent in nature. Their office is such that they cannot be conferred with the position of irremovability. Their process of removal cannot be made tougher by equating that removal process to that of the removal process of a Supreme Court judge. So, the court held that the higher status, the seemingly higher status that is conferred on a Chief Election Commissioner is because of the fact that his office is a permanent office, and the office of Election Commissioners is not a permanent office. The court also went on to observe that even though they were not given status equivalent to that of Chief Election Commissioner, the Constitution makers did provide the Election Commissioners also with some sort of independence and security of tenure by placing their removal subject to the recommendation of Chief Election Commissioner.

So, this was how the court settled the matter. So, the Supreme Court settled that there is no higher status that is accorded to Chief Election Commissioner and that both are to be treated at par. Very recently, a Constitution bench of the Supreme Court pronounced a judgment called *Anoop Baranwal v. Union of India*. This has the potential to transform the way in which the Election Commission of India operates. This is because, Article 324 Clause 2 of the Constitution of India, provides that the appointment of Chief Election Commissioner and other Election Commissioners shall be determined by the President until the parliament makes a law on that behalf.

So, the aspect of determining how to appoint Election Commissioners including Chief Election Commissioner has been left to the parliament by the Constitution makers. The other thing is just that the parliament has not made a law till date. Another legislation which was brought out by the parliament for regulating the conditions of service of Election Commissioners does not deal with the matter of appointment of Election Commissioners which the parliament is empowered to do. So, what the court said in this case is that because parliament has not made a law governing the appointment of Chief Election Commissioner and other Election Commissioners, it will step in and make a law. This is not a new phenomenon.

In the *Vishakha* judgment where the Supreme Court stepped in because there was a legislative vacuum. There was no rules or laws to prevent sexual harassment at work place. So, the Supreme Court formulated a set of guidelines until Parliament made a law on their behalf. So, it is the same principle which is being applied here. Since parliament has not yet made a law, the court felt that it should step in to make a law governing the appointment of Chief Election Commissioner and other Election Commissioners.

What the court stated in this case was that for the appointment of Election Commissioners and the Chief Election Commissioner, a committee needs to be constituted and this committee should consist of the prime minister, the leader of opposition in the Lok Sabha and the chief justice of India. This committee comprises a representative in the parliament, an executive member, and a member of the judiciary. And it is based on the recommendations of this committee that the appointment of Election Commissioners and Chief Election Commissioner has to be finalized. Another rule that was made by the court in its judgment is that the conditions of service of Election Commissioners should also not be varied to their disadvantage once they have been appointed. This was a safeguard that was applied solely for the Chief Election Commissioner under the Constitution.

The Supreme Court's judgment extended the safeguard to the other Election Commissioners as well. But the court did not rule that the grounds of removal of Election Commissioners should also be similar to that of Chief Election Commissioner. The court merely said that it is desirable if the grounds of removal of Election Commissioners are also similar to that of Chief Election Commissioner which is equated to that of a judge of a Supreme Court. So once again the appointment was made subject to the recommendations of a committee composed of the prime minister, leader of opposition in the Lok Sabha and the chief justice of India. The conditions of service of Election Commissioners were equated to that of Chief Election Commissioners in as much as the conditions of service cannot be varied to disadvantage after appointment.

But the court merely recommended that the grounds of removal of Election Commissioners should also be equated to that of Chief Election Commissioner. The court's recommendation is based on the fact that Article 324 clause 2 reveals an expectation that parliament would pass a law providing for the mechanism of appointment of Chief Election Commissioner. So in its absence the court was stepping in to fill the vacuum. And the suggestion of involving members of the parliament, executive and judiciary is not something new. The court did not come up with that suggestion on its own. Rather they were following the suggestion that was mooted by various committees that were constituted for looking into the possibilities of reforming the election commission. Various committees and commissions have been constituted. So, the court took up this as a suggestion from various commission and committee reports that had put forward this idea. Whether this new rule made by the Supreme Court will compromise on the aspect of

independence of the Election Commission of India, because the prime minister who is a member of the executive is involved is a question for reflection.

Regarding the administrative machinery for elections, the Election Commission of India is the nodal body when it comes to governing election matters in the country. But there are also a lot of government officers who take care of the administrative matters surrounding elections. One such officer is the Chief Electoral Officer. This is the officer who supervises the election work of an entire state or an entire union territory.

There is a similar officer for each district called the District Election Officer who supervises the election work of an entire district. There is a Chief Electoral Officer and a District Election Officer. Then we became an Electoral Registration Officer. This is the officer who prepares the electoral rolls for each and every parliamentary constituency as well as state assembly constituency.

At another level of the hierarchy are the people called Booth level officers. So these are officers who are functioning with the local government. These may be officers who are otherwise employed with the state government or the local government. These people will also be the voters of the particular area of which they are a Booth level officer. So there may be a constituency of which they are a voter and they may also act as the Booth level officer

Now, these Booth level officers have a very critical role to play. Since they are the particular localities of that area, they might be in a position to understand what all changes have happened in that constituency. Who all have left that constituency? Who all have migrated? Who all have passed away in that particular year? So this will help the election workers to update the electoral rolls. As you all know, once you have your name in the voters list, only then you are eligible to vote. Booth level officers go from door to door in their particular constituency and they ensure that the voters list gets updated by removing the names of the people who have left the place and by adding the names of the people who have recently joined. This is an overview of the administrative machinery for elections. In addition to these officers, we also have another set of officers called the returning officers, the presiding officers and the observers. These three sets of officers are appointed under the Representation of Peoples Act of 1951. One is returning officers who are appointed by the Election Commission for a particular general election in each state and the returning officer will be generally an officer of the government or of a local authority and one returning officer can be nominated for more than one constituency in a particular state.

There are also some officers who are appointed who are called assistant returning officers who will assist the returning officers in conducting the elections. The duties of the returning officers are not explicitly mentioned in the Representation of Peoples Act. The returning officers are expected to do all such acts that are necessary for an effective conduct of the

elections. But in reality, the returning officer performs duties like accepting and scrutinizing nominations, the publishing of the affidavits of the candidates, the allotting of symbols to each election party, preparing the electronic voting machines and the VVPAT, even the counting of votes and the declaration of results. In all of these activities, the returning officer has a very crucial role to play.

The returning officers are called so because they hold the elections and return the results of an election. That is why they are called the returning officers. There is also another set of officers called the presiding officers. These are officers who are appointed by the Election Commission, but these are officers who are appointed on deputation. So, their deputation gets over when that particular election also gets over. And their duty is to keep the polling station in order and to ensure that the polls are being conducted fairly. The terms Presiding officers and polling officers must not be confused. Polling officers are those officers who are usually government servants who are appointed just for the purpose of a particular election. These may be teachers in a government school. These may be officers of a public sector undertaking. These polling officers, they are the ones who mark that indelible ink on your finger when you go to a polling station to cast a vote. Those are the polling officers. They will assist the presiding officers. The presiding officer will ensure that the elections are being conducted fairly. Their duty as the name itself hints is to preside over the polling station and ensure that everything is being conducted in a fair manner. The last set of categories of officers are called observers. There are two kinds of observers in every election. You might see people belonging to or maybe affiliated to a particular political party sitting in one corner of the polling station to ensure that there is no malpractice, to ensure that there is no one political party trying to influence the voters, etc. So, there will be representatives of each political party in one corner of the presiding polling station.

But the observers are not those people. Observers are the officers of the government of India itself who are present in each polling station in each constituency to ensure that the elections are being conducted in a smooth manner. Observers, what makes them different is that they have a power that none of the other officers have. The observers can direct the returning officer to stop the counting of the votes or to not declare the results after the votes have been counted. They can do this or they can exercise this power if they feel that some untoward events like booth capturing or some illegal malpractice is being conducted in a polling station or maybe some of the electronic votes have been tampered with or destroyed. In such cases of exigencies, the observers can direct the returning officers to stop counting the votes and to stop declaring the results.

The Constitution prescribes that the Election Commission is to ensure superintendence, direction, and control of the preparation of electoral votes. What does superintendence, direction, and control of preparation of electoral votes mean? For that, we need to look into

this legislation called the Representation of Peoples Act of 1951. It is this legislation which provides a clarity on the scope and ambit of Election Commission's powers.

There are a different variety of functions for the Election Commission of India under the Representation of Peoples Act. This starts from the Election Commission of India's mandate to notify the dates for elections. The Election Commission conducts elections to four offices, parliament, state legislative assembly, President, and Vice President. So, for all of these four elections, the Election Commission of India has to notify the dates on which the elections are to be held. The next function is that the Election Commission has to direct as well as approve the polling stations of each constituency in each state.

So, this is also something that the Election Commission has a prerogative of. In every election, there is a nomination of candidature and after that the returning officer scrutinizes the nominations to see that everything is intact, and no laws are being violated. It is only after the scrutiny of nominations, the candidature is accepted or rejected. Then after that, even after the candidature of a particular candidate has been accepted by the returning officer, the candidate can withdraw himself from elections. For all of these, there are certain last dates beyond which you cannot do any of these activities.

So, there is a last date for filing nominations as a candidate of a political party for contesting the elections. There is a last date by which the scrutiny of nominations has to be completed. There is also a last date beyond which you cannot withdraw your candidature. So, all of these last dates are being fixed by the Election Commission. It is the Election Commission which also fixes the date and time on which the elections will be completed, and the results will be declared.

So, all of these are decided by the Election Commission of India. The Election Commission also fixes the number of hours within which the entire polling process should be completed. So, if you have gone to vote in some of the elections, you might have noticed that there will be a provision of time, say from 6 am to 6 pm beyond which you cannot cast your vote. So, the number of hours within which you need to cast your vote is also fixed by the Election Commission. Now, in certain circumstances, there may be a need to adjourn the poll to a later date. Suppose there is a natural calamity in a particular state or a major accident or a riot which is happening within the state. All of these are unforeseen situations or unexpected events in which you cannot conduct an entire process of election in a very peaceful manner. So, in such situations, the Election Commission takes a call on whether to conduct elections in that state at that particular point of time or to adjourn it or postpone it to a later date. But in certain situations, there might be no option but to cancel the elections.

In legal terms, we call it declaring the elections void. So, this will render that entire process of elections as having the effect of being cancelled. This might happen in situations where

booth capturing takes place. Booth capturing is a situation where there are people inside the polling station and they ask or influence the voters to vote for a particular party, maybe by force, maybe by coercion or by threatening. This is what booth capturing and election is declared void in situations of booth capturing or maybe if they have reason to believe that the electoral votes have been tampered with or destroyed either intentionally or accidentally.

In such situations, you cannot adjourn the polls, but you will have to declare the elections void and you will have to call for a fresh election in that particular constituency. So, it is the ECI or the Election Commission which takes a call on this and declares an election void and calls for fresh polls. The entire administrative machinery for elections that is supervised by and directed by and within the control of the Election Commission of India. They have to supervise the Chief Electoral Officer who will in turn supervise the other people who come within the hierarchy. The Election Commission has the overall responsibility to supervise the entire administrative machinery.

It is the Election Commission which designates other key personnel such as the returning officers, the presiding officers, the polling officers, and the observers in each particular constituency. So the entire administrative machinery of elections runs under the control and direction of the Election Commission of India. Lastly, under the Representation of Peoples Act, there is this concept of registration of political parties. There are certain benefits that come from registering with the Election Commission of India as a political party. This might be with respect to getting symbols allocated to them or getting a particular name allocated to them.

These are certain prerogatives that are there for political parties if they register. Registration is mandatory for recognition of a political party as a national party or as a state party. For this it is the political parties who register themselves with the Election Commission of India. This is a broad overview of the various functions that are performed by the Election Commission of India as envisaged under the Representation of Peoples Act of 1951. Did you know that airwaves are considered as a public property? There is a Supreme Court judgment called the *Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal*. This is a landmark judgment which ruled that airwaves are to be considered as a public property. This means that all citizens have a right to access and use airwaves in an equitable manner. Airwaves are most frequently used in TV as well as radio. You might have seen different political parties trying to spread out their message to their voters through television programs and radio programs. So, since airwaves are a public property, the Representation of Peoples Act has created a mechanism whereby it has conferred on the Election Commission of India a responsibility to ensure that airwaves or the spectrum is distributed amongst all political parties in an equitable manner.

The Election Commission of India will assign certain broadcast time on the government-owned media such as Doordarshan or All India Radio. Within this broadcast time, each political party can do their election campaign through TV or All India Radio. This is done by giving 45 minutes to each political party. This is just applicable for the government owned media that is Doordarshan and All India Radio. This is an option that is available only for the parties which are recognized as national parties or state parties.

So base time of 45 minutes is allocated to all political parties. If an additional time is given to a political party, it will be based on their past electoral performance. So, if a political party A has won in the election in the past year, then they will be given an additional time say which is different from a party which did not win the elections. So, the additional time is allocated based on the previous electoral performance. There are certain slots in TV as well as in radio which are considered prime time. This is the time gap within which there will be a maximum number of viewers listening to the programs or viewing the programs.

This prime-time slot may be from 8 to 9 or from 7 to 8 depending on which time lot is garnering a greater number of viewers. To ensure that no one political party gets the advantage of doing their election campaign during the prime-time slot, the time slots themselves are distributed to each of the political parties through a lottery system. Lots are picked for each political party to understand within which time they should do their election campaign. So, this will ensure that no preferential treatment is given for one political party for the prime-time slot. Before these programs are being aired on TV or on radio, the transcripts of that program will be reviewed and vetted to ensure that they do not violate any of the laws and regulations.

The laws and regulations are present in the Model Code of Conduct which lays down certain dos and don'ts that each political party has to abide by, each candidate has to abide by once the elections have been declared. These transcripts are vetted in order to ensure that they don't violate any of the conditions that are prescribed under the Model Code of Conduct or any other laws and regulations that are in place. And there may be a case that a political party will say that you have unreasonably asked me to restrict my speech, you have unreasonably asked me to delete a portion of my speech etc. In order to settle such disputes that might arise after the transcripts are reviewed and vetted, an apex committee will be constituted.

This apex committee will comprise of members from Akashvani and from Door Darshan and they will decide the disputes that are arising out of the review and vetting of the transcripts. Once this apex committee decides, that will be final and there can be no further deliberations on it. This is how airways are distributed equitably amongst all political parties once elections have been declared. This is also one additional function or prerogative that the Election Commission of India has by virtue of the Representation of Peoples Act, 1951.

This Model Code of Conduct is a list of dos and don'ts that each candidate and his political party is required to abide by before elections. And if they do not observe the guidelines that are mentioned in the Model Code of Conduct, the Election Commission can take an action against them which may even result in them losing out on their opportunity to become a representative. So, it is a serious guideline. Even though it is termed guidelines, it is a very serious guideline.

This has to be complied with without any dilutions. The first set of guidelines under the Model Code of Conduct is regarding the general conduct of the political parties and their candidates. You cannot indulge in any activity which is likely to cause communal tensions or tensions amongst different people owing to their religious background or caste background or gender. You cannot flare up those existing differences by your election campaigns. Secondly, even if you criticize your political opponents, it should be strictly regarding the work of those political opponents in the public domain.

You cannot criticize them for their private activities or their private life. And you also cannot lodge unverified allegations that may result in a grossly distorted picture of that particular candidate or party in the public domain. As part of general conduct, you also cannot appeal to different voters based on the language or caste or religion. You cannot ask for a vote directly or explicitly based on such considerations. And you also cannot use places of worship for your election campaigns. Say, you cannot conduct an election campaign in front of your mosque or temple or church.

These activities are strictly prohibited. There might be instances where the parties or candidates may indulge in corrupt practices like intimidating voters to vote for their particular party or to bribe their voters to vote for them. These are also activities that are prohibited under the modern code of conduct. Under the general conduct, there is also one more aspect that is mentioned which is that you cannot organize picketing activities or demonstrations in front of people as a mark of protest. You have to respect the private life of all the voters of your constituency. So, if you know that a particular voter is not likely to vote for your party or your candidate, you cannot go and sit in front of their houses and launch a dharna or a demonstration as a mark of protest.

This is also something that is clearly prohibited under the modern code of conduct. The second set of guidelines is regarding the meetings of these political parties. Whenever a political party or a candidate is holding a meeting, they have to inform the police well in advance so that necessary arrangements can be made for controlling their traffic and maintaining the law and order. They also have to seek necessary permissions if at all they want to use things like loudspeakers for their election campaigns. For all of these, there are licenses or permissions that are required. All of these have to be secured well in advance before the political parties or the candidates conduct meetings in the open public domain.

Processions happen as part of election campaigns. These are called by various names in your district. It might be an election rally; it might be an election campaign or a roadshow. In all of such processions, there are certain guidelines that have to be followed. Again, time, place etc. have to be notified to the police well in advance so that they can ensure the necessary arrangements. And if it is going to be a long procession, they have to bifurcate into segments so that after each segment is over, the police can release the traffic that they have been holding.

This will ensure that the election campaign will also happen and the public's life and the right to move will not be curtailed in a restrictive manner. This is also something that has been mentioned under the Model Code of Conduct. Now on the polling day, the candidates and the political parties have to cooperate with the election commission's officers to ensure that the polling happens in a very smooth manner. The Model Code of Conduct also explicitly states that you cannot exhibit any flag of your political party or any symbol or poster on the polling station.

It is only the candidate's name that will have to be written in the polling station. All the political parties exhibiting their candidate's name, only that is permitted. You cannot put any election campaign material such as posters, flags or election symbols in front of the polling station. Another aspect in the Model Code of Conduct is certain guidelines that are exclusively there for the political party that is in power at the time of elections. So, when a party is in power, they will have access to a lot of government resources. But the Model Code of Conduct clearly says that you cannot use government resources for your campaigning or for your advantage, for putting your political party in a position of advantage.

The government resources cannot be utilized. There are also certain other guidelines, say you cannot issue advertisements with the money that is drawn from the public exchequer. You also cannot do certain activities once elections have been declared. So, you cannot lay foundation stones in any particular building or in any particular locality. This is something that the political party in power is usually prone to doing, because they hold the positions of responsibility. So, once the elections have been declared, you cannot lay foundation stones and you cannot make promises for providing public utilities.

You cannot make promises of job guarantee, or guarantee of a facility in your constituency, etc. As long as it is a public utility, you cannot make such promises once elections have been declared. And you also cannot engage in ad hoc appointments. So, this sort of restriction comes into play in a particular time period that is fixed by the Election Commission and usually it is the two weeks preceding the date of election. It is at that point of time when such sort of restrictions will come into play. So, when all of these restrictions are in place is to be decided by the Election Commission of India.