

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 6

2023

© 2023 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of **any suggestions or complaints**, kindly contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

The Backbone of Democracy: Electoral Commission Autonomy and Judicial Reinforcement

DR. NEHA SHUKLA¹

ABSTRACT

The public's opinion of election integrity is significantly influenced by the degree to which electoral commissioners are able to function free from outside influence and political pressure. India is a democracy, according to the constitution, where citizens alone are able to choose their government. Without the public's active participation, democracy is pointless. Free and fair elections are important to the democratic process. However, elections are known for witnessing power struggles and drifts, which can destroy the fundamental elements of election fairness and freedom. As a result, a watchdog is needed to stop this threat and ensure that every person has the opportunity to exercise their rights. In order to fulfill the deadline, an independent committee was established to guarantee a free and fair election.

This independent body is not subject to political or executive pressure. But holding elections is not simple; there are many obstacles to overcome. Since electoral reform procedures that have the potential to fortify newly established democracies depend heavily on the independence of electoral commissioners, evaluating their level of independence is crucial. However, a lack of theoretical clarity and the deficiency of a standard evaluation method have hindered efforts to comprehend and evaluate electoral commission independence. The purpose of this study is to ascertain the significance of fair and free elections in democracies as well as the constitutional framework that guarantees free and fair elections. Furthermore, it makes an effort to recognize the historical and current influence of the judiciary on election outcomes.

Keywords: *democracy, free and fair election, de facto & de jure freedom.*

I. INTRODUCTION

Formal or “*de jure* independence” and informal or “*de facto* independence” are the two forms of independence that need to be considered. The official regulations as they are outlined in legal, constitutional, and other documents are referred to as formal independence. The degree to which these guidelines are really adhered to in practice is known as informal independence. Stated

¹ Author is an Assistant Professor at School of Law and Governance, CUSB Gaya, Bihar, India.

differently, it considers the extent to which an election commission is entitled to make decisions and take actions on a daily basis in order to conduct an election free from excessive political or outside influence. It is vital to evaluate equally formal & informal independence as the data indicates that numerous commissions with the term "independent" in their titles are anything but, and that official guidelines are frequently flouted in real-world situations. Partisan interference can theoretically originate from the opposition or the ruling party, or from both, but in reality, the charge is typically directed against the ruling party's ability to use its larger resources and influence to sway the commission in its favor.

Having a solid lawful foundation that shields it from politics, an appointment process that guarantees commissioners are respectable people and not just party stooges, tenure security that allows commissioners to make unpopular decisions without fear of losing their jobs, autonomy over decision-making in crucial areas like staffing, the budget, and acquisition of election-related materials like ballot papers, and the ability to announce the results of the election without first receiving approval from another institution are all important aspects of electoral commission independence. Even if electoral commissioners declare results that are accurate, they may face criticism if they are perceived as lacking in independence. Based on this, the article goes on to offer a thorough set of eleven standards for assessing the independence of electoral commissions, which are divided into three primary types of autonomy:

- (i) Institutional along with leadership;
- (ii) Functional along with decision-making; and
- (iii) Financial with budgetary.²

In *Kihoto Hollohan v. Zachillhu & others*³ the Supreme Court opined that “Democracy is the basic feature of the Constitution. An election conducted at regular, prescribed intervals is essential to the democratic set up as envisaged in the Constitution. So it is the basic need to protect and sustain the purity of electoral process that may take the quality, efficacy and adequacy of the machinery for resolving electoral disputes”.

All agree that democracy is an intricate system that keeps people interested and involved in politics. Human beliefs are rooted in democracy, which is another word for equality of religion and belief and ultimate intellectual advancement. Aristotle defined democracy as "the rule of

² Nic Cheeseman Professor of Democracy University of Birmingham, UK Jørgen Elklit Professor Emeritus of Political Science Aarhus University, Denmark, Understanding and Assessing Electoral Commission Independence: a New Framework, available at : <https://mail.google.com/mail/u/0/?tab=rm&ogbl#sent/FFNDWLvvxznBpGNVKvwDNLKjbWMHnfl?projecto=r=1&messagePartId=0.1> (last visited on 22-12-2022).

many". The most widely accepted definition of "a government of the people, by the people, and for the people" was provided through President of US Abraham Lincoln.

The Indian people exercise their authority through elected leaders, as stipulated by the Indian Constitution. The most well-liked aspects of democracy are thought to be universal adult suffrage, free, equitable, and regular elections, as well as independent electoral apparatus. The Constitution of India guarantees universal adult suffrage by stating in Article 326 that everyone who is at least eighteen years old and is not otherwise excluded (due to non-residence, mental incapacity, criminal activity, or corrupt legal practises) is entitled to register as a voter.

Although the fundamental right of vote is not stated explicitly in the Constitution, it is widely accepted that it is an indispensable component of speech related freedom guaranteed by Constitution.⁴ Therefore, the foundation of a citizen's constitutional right to vote is their ability to exercise their right to free expression as provided by Article 19 and their ability to be registered as electors on the electoral roll. The efficacy of three triangle-shaped components is critical to the conduct of fair and free elections. They are as follows:

- (i) the candidates and political parties;
- (ii) the electorate is unbiased and neutral; and
- (iii) the people who vote.

In actuality, elections are thought of as the lifeblood of democracy and sit at its core. An election loses meaning and purpose if it is not fair; the effectiveness, impartiality, and sufficiency of the electoral apparatus play a critical role in determining the legitimacy and fairness of the democratic process.

II. RULE OF LAW AND DEMOCRACY AS A BASIC STRUCTURE

The SC was required to consider the validity of the 39th amendment, which added Article 329A to the Constitution, in the election case of *Indira Gandhi v. Raj Narain*.⁵ Article 329A's clauses (4) and (5) were challenged on the grounds that they prohibited the application of any law and the exercise of judicial review in relation to the Lok Sabha Speaker and Prime Minister elections. As a result, it was claimed that the challenged amendment had violated the fundamental elements of Constitution, including judicial review, separation of powers, democracy, and the rule of law. These claims were made by the petitioner. The Court ruled that democracy constituted a component of the Constitution's fundamental framework. According

⁴ The Constitution of India, art. 19(i)(a).

⁵ (1975) Supp S.C.C.1.

to the ruling, any amendment that goes against democracy would be unconstitutional.

III. FREE AND FAIR ELECTIONS IN INDIA

Elections are the foundation of democracy. They provide people the power to select and hold political leaders responsible. But in order for elections to fulfill their essential function, they must be equal and free. Having an election alone is insufficient; an election cannot be deemed "free and fair" if ballots are not correctly counted or if any individuals are denied the right to vote. Governments must abide by certain rules before, during, and after elections in order to certify that they are fair and free. The eight requirements are as follows:

- (i) Voters can obtain trustworthy information.
- (ii) Voter registration is available to all citizens.
- (iii) People are able to run for public office.
- (iv) Every voter has access to the polling site and the voting method.
- (v) There is no intimidation of those who cast ballots.
- (vi) There is no fraud in voting.
- (vii) Following an exact count of the ballots, the correct results are declared.
- (viii) The election's outcomes are acknowledged.

In India, the poor, illiterate, and disadvantaged vote more than in wealthy and affluent countries. This is in contrast to western democracy, where poor people, African Americans, and Hispanics vote far less than rich and white people. In India, ordinary citizens place a high value on elections, believing that they can use them to exert pressure on political parties to carry out policies and initiatives that will benefit them. They also feel that their vote counts in the way that the country is run.⁶

IV. LEGISLATION ON FREE AND FAIR ELECTIONS

- i. "The Representation of the People Act"⁷
- ii. "The Registration of Electors Rules"⁸
- iii. "Conduct of Election Rules"⁹

⁶ This provides for the delimitations of the constituencies for the purpose of elections to the House of People and the Legislature of States; qualifications of voters at such elections; preparation of electoral rolls; and other matters connected.

⁷ The Representation of the People Act, 1950 (Act 43 Of 1950).

⁸ The Registration of Electors Rules, 1960.

⁹ Conduct of Election Rules, 1961

- iv. “Presidential and Vice-Presidential Rules”
- v. “Anti-defection Law”

Strong laws are still needed in India to ensure more fair and free elections. However, the legislature is not taking the initiative on this issue because of certain constitutional restrictions on fundamental rights and political motivations to seize and hold onto power.

V. JUDICIAL TRENDS TOWARDS FAIR AND FREE ELECTIONS

The SC is the watchdog of the Indian Constitution, aside from its original jurisdiction. The SC of India has been granted further authority to oversee the judicial review of legislative action, administrative action, and court decisions. The SC of India Has An Important Role In The Development And Progress of The Country. The SC has established criteria for electoral reforms in numerous cases, and it has also rendered decisions in certain cases that the Election Commission of India must abide by.

In *MS Gill v. CEC*¹⁰, the SC held that while Parliament has the authority to create laws pertaining to election conduct, the EC is ultimately in charge of carrying out election-related duties. Legally speaking, no bill passed by Parliament can restrict the EC's plenary powers. Any such bill passed by Parliament would be in violation of Article 324. A fundamental component of the framework is the EC's periodic holding of free and fair elections.

In *TN Seshan v. Union of India*,¹¹ the Supreme Court stated that as democracy is the cornerstone of our constitutional system, there can be no disagreements about the fact that holding fair & free elections for our legislative members by themselves will ensure the development of a strong democracy in the nation. The framers of our Constitution believed that an impartial body free from political and/or executive influence should be in charge of holding fair & free elections nationwide so as to maintain the integrity of the electoral process. Therefore, holding elections at regular, predetermined periods is crucial to the democratic system that the Constitution envisions.

The terms "superintendence", "direction", and "control" are sufficiently broad¹² to encompass all the authorities required to ensure the seamless conduct of elections. The SEC will make every effort to conclude the election before the five years' timeframe specified in clause (1) of section 13 of the Act, 1971, and will not give in to circumstances that could be brought about

¹⁰ (1978) 1 SCC 405.

¹¹ (1995) 4 SCC 611.

¹² The superintendence, direction and control of the conduct of elections referred to in Article 324 (1) of the Constitution are entrusted to the Commission.

by special interests to force elections to be held later than the allotted time.

*PUCL v. UOI*¹³ Regardless of whether the ability to vote is regarded as a fundamental right or not, citizens may be granted the freedom to vote negatively. Either the Election Commission must issue a statutory directive or Parliament must approve a similar statute.¹⁴

Kesavananda Bharti v. State of Kerala,¹⁵ in numerous significant rulings, the Supreme Court has maintained that democracy is ingrained in the Constitution and that fair & free elections are essential to a democracy's fundamental characteristics.

*PUCL v. UOI*¹⁶ & *UOI v. Association for Democratic Reforms*¹⁷ established that voters' right to know the candidates' backgrounds was acknowledged as a basic right u/A 19 (1) (a). They implored the Court to order the Commission to take decisive action so that voters would have the option to vote against the persons running for office in "favour". This was in line with the Supreme Court's rulings in the aforementioned instances supporting the "right to know", which suggested that the ability of electors to make decisions was guaranteed by Article 19(1) (a) and included the ability to cast negative votes.

The SC concluded in "*N.P. Ponnuswami v. Returning Officer*"¹⁸ & *Kuldip Nayar v. UOI*¹⁹ India that the right to vote is not a basic right under Part III. It was argued that voting was only a statutory right and was not even close to being a basic right, let alone a constitutional one.

VI. SIMULTANEOUS ELECTION IN WHOLE NATION

In India, elections for the state assemblies and the Lok Sabha were held concurrently in 1952, 1957, 1962, and 1967. Due to the dissolution of several Legislative Assemblies earlier for a variety of reasons, this practice was abandoned in 1968–69. Since then, India has made a concerted effort to reinstate the previous electoral system, but political parties cannot agree on anything.

A commission led by former Indian President Ramnath Kovind was established by the Union

¹³ (2009) 3 S.C.C. 200.

¹⁴ Under The Representation of Peoples Act, 1952, the right to vote is articulated as follows:

"Sec. 62. Right to vote.

(1) No person who is not, and except as expressly provided by this Act, every person who is, for the time being entered in the electoral roll of any constituency shall be entitled to vote in that constituency. (2) No person shall vote at an election in any constituency if [s]he is subject to any of the disqualifications referred to in section 16 of the Representation of the People Act, 1950.. (5) No person shall vote at any election if he is confined in a prison, whether under a sentence of imprisonment or transportation or otherwise, or is in the lawful custody of the police."

¹⁵ (1973) 4 S.C.C. 225.

¹⁶ (2002) 5 S.C.C. 294.

¹⁷ (2003) 4 S.C.C. 399.

¹⁸ A.I.R. 1952 S.C. 64.

¹⁹ (2006) 7 S.C.C. 1.

government to investigate the viability of simultaneously holding state assembly and Lok Sabha elections under the ONOE²⁰ banner. Regarding One Nation, One Election, several recommendations have been made. Constructing state and federal elections at the same time would be a difficult task. Significant logistical and constitutional adjustments will be needed. The Constitution would need to be amended in at least five ways, including how long the state and parliamentary legislatures can exist for and how the President can dissolve them. More specifically, articles 83, 85, 172, 174, and 356 would all need to be changed.

(i) Constitutional and Practical Challenges

ONOE has some legal and practical obstacles to overcome. How to match the Lok Sabha's tenure with that of legislative assemblies is the main obstacle. It will be necessary to dissolve some state assemblies early in order to implement ONOE because their five-year term won't end by the time of the upcoming Lok Sabha elections. Article 172, which states that "Every legislative assembly of every state, unless sooner dissolved, shall continue for five years," may be to blame for this. The Lok Sabha has a five-year term under Article 83, unless it is dissolved earlier.

Before ONOE is implemented, these constitutional clauses must be changed. General elections for state legislative assemblies and the dissolution of the Lok Sabha are scheduled in accordance with Sections 14 and 15 of the Representation of the People Act, 1951, respectively. These clauses will also need to be changed in the event that ONOE is put into effect.

(ii) The Need for One Nation One Election

- With five to seven State assembly elections held annually on average, India is perpetually in election mode. All significant stakeholders are impacted by this, including the federal government, state governments, and government workers, educators who are on election duty, voters, political parties, and candidates.
- The implementation of a "model code of conduct" results in the suspension of regular government operations and programs of the federal and state governments in the state where the election is taking place, according to the 79th report of the parliamentary standing committee. This results in a government deficit and policy paralysis.
- Both the federal and state governments incur enormous costs as a result of regular elections. As a result, it wastes tax dollars and interferes with economic efforts.
- Regular elections also cause the focus of government to change from long-term to short-

²⁰ One nation one election.

term policy objectives. As a result, prudent financial planning is neglected, and the government frequently engages in wasteful spending.

(iii) Demerits of One Nation One Election

There are a number of drawbacks to such a reform, even if simultaneous elections do end up happening. Numerous opposing political groups have expressed their unwavering opposition to this proposal.

- Voters' perceptions may be impacted by concurrent elections. Voters will typically pay greater attention to national issues than local ones.
- Regional parties won't be able to properly bring up local and regional issues because of the powerful Central politics.
- It will strengthen India's political and polity's propensity toward centralization.
 - a. Concurrent elections may make it more difficult for the government to answer to the people. Simultaneous elections would prevent the administration and parliament from being held accountable, which is why regular elections are necessary.

State elections will need to be postponed in order to synchronize the elections. Since the president is the only one who can accomplish this, federalism and democracy would suffer. The modification to the constitution that limits a vote of no confidence to only "constructive" votes has the potential to undermine the principles of parliamentary democracy. Election reform, such as simultaneous elections, may have significant advantages, but in order to make it work, a number of constitutional and legal changes must be made. According to the Law Commission, simultaneous elections are not appropriate within the current constitutional framework. This calls for a number of changes to the state legislative assemblies' and the Lok Sabha's rules of procedure, as well as to the representation of the People act of 1951 and the constitution.

(iv) Criticism of Simultaneous Election

Important opposition political groups have communicated their concerns on this proposal to the parliamentary standing committee.

- They have questioned whether it will be feasible to hold simultaneous elections, which will necessitate amending statutes and the constitution to change the terms of the parliament and various assemblies.
- Some detractors claim that this notion is politically driven because holding elections at

the same time could sway voters' decisions. Even in state elections, voters will ultimately cast ballots on national issues.

- Local and regional parties, which frequently speak for the interests of regional social and economic groups that the federal government typically ignores, run the risk of being marginalized. The breadth and depth of Indian democracy would be impacted by this.

VII. SUPREME COURT RULING REGARDING CEC AND EC APPOINTMENT

A 5-judge panel of the SC unanimously decided in the historic *Anoop Baranwal v. UOI*²¹ case that the President will appoint the CEC²² and EC on the suggestion of a committee made up of the PM, the Leader of the opposition in the Lok Sabha, and the CJI of SC. The head of the opposition party with the most members in the Lok Sabha shall be a member of this committee if there isn't a leader of opposition available.

(A) Supreme Court Opinion-

According to the SC, it is evident from reading the Constituent Assembly's deliberations on the nomination of the ECI that every member was adamant that an independent Commission be tasked with overseeing elections. The purposeful inclusion of the phrase "subject to the provisions of any law made in that behalf by Parliament" further suggests that the CA intended for the legislature to establish guidelines for ECI appointments.

To ascertain the intent of the founding fathers of the Indian Constitution, the Court went to the Debates of the Constituent Assembly. The election mechanism ought to be independent of the executive branch, as Dr. B. R. Ambedkar noted. The other Framers of the Constitution concurred, although they deferred to Parliament's judgment when determining the precise procedure for nomination. The Bench concluded that this objective was shown by the term in Article 324(2) that reads, "subject to the provisions of any law to be made by the Parliament."

Although the court is not allowed to interfere in matters that are solely legislative, the Constitution, the Legislature's inertia, and the void that results from this make the court's intervention necessary. Regarding the issue of whether the removal procedure for CEC and ECs²³ should be the same, the SC ruled that it cannot be since CECs have a unique position and without CECs, article 324 cannot function.

²¹ 2023 SCC OnLine SC 216, (decided on 02.03.2023).

²² Chief election commissioner.

²³ Election Commissioners.

(B) Existing Provisions for ECI appointment

Elections are covered by the constitution, which also creates a commission to look into numerous issues. Following the Election Commissioner Amendment Act of 1989, the commission was expanded to include two additional ECs in addition to the original one CEC. Article 324 states that the CEC and any other ECs, if any, that the President may from time to time designate, will make up the Election Commission. Section 324(2): Subject to the provisions of any legislation passed by Parliament in this regard, the President will nominate the CEC and other Election Commissioners. The Prime Minister is presented with a list of qualified applicants to choose from by the Law Minister. On the PM's recommendation, the President appoints the new member. The terms of office and duration of the Election are set by the President.

Their term of office is for six years, or until they become sixty-five, whichever comes first. They are free to leave at any moment, or they can be fired before their term is up. Only Parliament can remove the CEC from office through a procedure akin to that of a judge of SC. Removal of any other EC requires the CEC's recommendation. The Bench emphasized that the ECI must adhere to the principles of equality and the rule of law while also being impartial and independent. The Bench emphasized that in order to guarantee accountability and openness, the ECI must be chosen objectively. Thus, the ECI's independence and integrity are maintained.

VIII. THE CEC & OTHER ECs (APPOINTMENT, CONDITIONS OF SERVICE AND TERM OF OFFICE) BILL, 2023

August 10, 2023 saw the introduction of the CEC and Other ECs Bill, 2023 in the Rajya Sabha. It does away with the 1991 Act and establishes the CEC and ECs' terms of service and appointment procedure. "The Election Commission (Conditions of Service of Election Commissioners and Transaction of Business) Act" of 1991 is being replaced by the Bill. It outlines the processes for selecting, paying, and dismissing ECs and the CEC. The President will appoint the CEC and ECs based on the Selection Committee's proposal. The Prime Minister, a Union Cabinet Minister, and the Leader of the Opposition/leader of the biggest opposition party in the Lok Sabha shall make up the Selection Committee.

(A) Key Issues and Analysis of Bill

There is a possibility that the government will control the Election Commission's nomination process, which could affect the commission's independence. Adopting the Selection Committee's recommendations notwithstanding a constitutional void might potentially result in

a government member monopoly over candidate selection. Since the CEC and EC salaries are set by the government, making them equal to the Cabinet Secretary may result in government influence. This is not the case for Supreme Court judges, whose pay is set by a parliamentary act. Additionally, ECs and CECs carry out quasi-judicial duties. Hiring just senior officials for these positions could keep out other qualified applicants.

IX. CONCLUSIONS AND SUGGESTIONS

The Election Commission needs to be redesigned and reformed, and the moment is right. The highest body established by the Constitution upholds honesty and excellence, and its mission is to guarantee that every Indian voter participates fully and fairly in the electoral process. The principles of equality, justice, fairness, the rule of law, and constitutional morality should all be upheld. It is suggested that the CEC & other ECs be appointed by an independent body, similar to the collegium's appointment of SC & HC judges, in order to uphold the true spirit of India's democracy and ensure inclusive and ethical elections. This will give the Election body more independence in order to conduct free & fair elections. It is also recommended that it be independent of the government's executive branch. Its activities and decision-making processes must be normatively independent, meaning that partisan, political, or governmental influence cannot be tolerated.

The 21st Law Commission has stated repeatedly in its draft report that simultaneous elections are necessary because of the country's current viable environment. The commission says it's a good way to keep the nation from always being in election mode. While it is a desirable change in theory, support from a variety of stakeholders is needed. For this reason, Niti Aayog recommends the creation of a targeted stakeholder group made up of political party representatives, think tanks, constitutional experts, and election specialists.

This panel will need to gather together and determine the best course of action, which may involve writing legislative and constitutional revisions. In the event that this reform is unsuccessful, the parliamentary standing committee has suggested in its 79th report a different and more workable strategy: having simultaneous elections in two phases. You may also think about this. As a result, there will be a number of obstacles to overcome and significant constitutional amendments needed to implement these reforms.

(A) Suggestions:

- As time goes on and new issues develop that limit the integrity, liberty, and justice of elections, the Constitution should be amended on time.

- The EC is the only constitutional body with significant authority, but more is still needed to ensure that the election process is free and fair in its entirety.
- The Indian legislature is relatively quiet when it comes to passing the necessary reforms to make elections more free and fair, citing them as very bold steps for the time being.
- The Indian judiciary is largely watchful over the election process, associated corrupt and wicked acts, and criminality in politics. However, it also needs to expeditiously resolve election-related problems by establishing specific benches for petitions pertaining to elections.
- Political parties bear the highest duty. The ability of the representatives to win is unquestionably important, but they must remember that the goal of the election process is to preserve and strengthen the democracy, which we have managed to obtain after overcoming numerous obstacles.
- Lastly, democracy has been shown to be the finest form of government, and the public needs to know this. The concerns that threaten the integrity and equity of our democracy and lead us away from it must be recognized for the sake of our nation's democracy's future growth.

X. REFERENCES

- Austin, Granville, *the Indian Constitution: Cornerstone of a Nation*, London, Oxford University Press, 1966.
- Bakshi, P.M. *The Constitution of India*, 3rd Edition, Universal Law Publishing Co. Pvt. Ltd. Delhi, 1996 Reprint 1997.
- Basu, D.D. *Constitutional Law of India* 7th Edition, Prentice Hall of India Private Limited, New Delhi, 1998.
- Dicey, A.V *Introduction to the Study of the Law of Constitution*, Universal Law Publishing Co. Pvt. Ltd. 10th Edition 2000.
- Jain, M.P., *Indian Constitutional Law*, 4th Edition, Wadhwa and Company, Nagpur, 1987 Reprint 1999.
- Pylee, M.V *An introduction to The Constitution of India* 2nd Revised Edition, Vikas Publishing House Pvt. Ltd., New Delhi, 1997 Reprint 1998.
- Seervai, H.M., *Constitutional Law of India*, Vol. 1, 4th Edition, N.M. Tripathi Pvt. Ltd. Bombay, 1991.
- Shukla, V N. *Constitution of India*, 10th Edition, Eastern Book Company, Lucknow, 200 1.
