

## The ECI cannot be a super government

The ongoing state assembly elections have brought the focus on the functioning of the Election Commission of India.

Powers enjoyed by the Election Commission of India:

- The ECI enjoys wide powers mainly derived from Article 324 of the Constitution.
- The Supreme Court in the Mohinder Singh Gill vs Chief Election Commissioner case held that Article 324 contains plenary powers to ensure free and fair elections and these are vested in the ECI which can take all necessary steps to achieve this constitutional object.
- All subsequent decisions of the Supreme Court have reaffirmed the judgment in the Mohinder Singh Gill vs Chief Election Commissioner case.
- Besides the model code of conduct, the ECI also issues from time to time directions, instructions and clarifications on a host of issues that crop up in the course of an election.

The model code of conduct:

- The model code of conduct issued by the ECI is a set of guidelines meant for political

parties, candidates and governments to adhere to during an election.

- This code is based on consensus among political parties. The model code is observed by all stakeholders for fear of action by the ECI.
- The code has been issued in exercise of the ECI's powers under Article 324.
- Since it is a code of conduct framed on the basis of a consensus among political parties, it has not been given any legal backing.
- The ECI's opposition to giving legal backing to the model code of conduct is based on the fact that once it becomes a part of law all matters connected with the enforcement of the code will be taken to court, which would delay elections.

Unresolved questions over ECI:

- There exists a considerable amount of confusion about the extent and nature of the powers which are available to the ECI in enforcing the model code of conduct as well as its other decisions in relation to an election.

Enforceability of the model code of conduct:

- Paragraph 16A of the Election Symbols (Reservation and Allotment) Order, 1968 says that

the commission may suspend or withdraw recognition of a recognised political party if it refuses to observe the model code of conduct.

- The article expresses doubts on the legal sustainability of this above provision.

- The reason is that withdrawal of the recognition of a party recognised under these orders seriously affects the functioning of political parties. Given the fact that the model code of conduct is itself not legally enforceable, the ECI may not be allowed to resort to a punitive action such as withdrawal of recognition.

### Transfer of officials:

- The ECI can transfer officials working under State governments if it receives a report from the observers of the ECI about the conduct of certain officials of the States that could adversely affect the free and fair election in that State.

- Given the fact that the transfer of an official is within the exclusive jurisdiction of the government, it is actually not clear whether the ECI can transfer a State government official

in the exercise of the general powers under Article 324 or under the model code.

- The article further argues that unbridled power to the ECI to transfer officials without the concurrence of the State governments could bring to a halt the whole state administration.

- In Mohinder Singh Gill's case, the Court had made it abundantly clear that the ECI can draw power from Article 324 only when no law exists which governs a particular matter.

- It means that the ECI is bound to act in accordance with the law in force.

- Transfer of officials, etc. is governed by rules made under Article 309 of the Constitution which cannot be bypassed by the ECI under the purported exercise of the power conferred by Article 324.

Interference in administrative moves:

- According to the model code, ministers cannot announce any financial grants in any form, make any promise of construction of roads, provision of drinking water facilities, etc. or make any ad hoc appointments in the government departments or public undertakings.

• The government is not allowed by the ECI to take any action, administrative or otherwise if the ECI believes that such actions or decisions will affect free and fair elections.

• This allows the ECI unbridled powers in intervening in the administrative decisions of a State government or even the union government.

• This power has been used by the ECI to stop the Government of Kerala from continuing to supply kits containing rice, pulses, cooking oil, etc.

The article argues against such a move based on the following aspects.

• This step could adversely impact the poor and marginalized people's ability to access food, especially in the post-pandemic phase.

• The Supreme Court in *Subramaniam Balaji vs Govt. of T. Nadu & Ors* (2013) held that the distribution of colour TVs, computers, cycles, goats, cows, etc, done or promised by the government is in the nature of welfare measures and is in accordance with the directive principles of state policy, and therefore it is permissible during an election.

•Section 123 (2)(b) of the Representation of the People Act, 1951 says that the declaration of a public policy or the exercise of a legal right will not be regarded as interfering with the free exercise of the electoral right.

Conclusion:

•The ECI, through the conduct of free and fair elections in an extremely complex country like India, has helped maintain the integrity and independence of the electoral process, considered indispensable to the democratic system.

•However, the unlimited and arbitrary powers enjoyed by the ECI need to be addressed given the dangers associated with such a scenario.