

BUILDING INSTITUTIONS

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Institutions are so many and so varied viz. ephemeral, permanent, statal, non-statal, constitutional, non-constitutional and so on, and with such different functions and objectives, that the subject does not meaningfully lend itself to generalisation. So, I will talk to you about the institution I know best i.e., the Election Commission of India, which is both a statal and a constitutional institution.



Post-independence, the Indian federation chose to have its governments at the Centre and in the States elected within a universal suffrage - parliamentary democracy dispensation. The elections could have been conducted by the government as in UK, USA and most of the countries of Western Europe. But the constituent Assembly which drafted the Indian constitution was aware of cheating, such as leaving communities out of the electoral roll or impersonation, even with the limited experience of elections under the Government of India Act 1919. And thus, it was paranoid about the possibility of elections being hijacked by the political executive or party in power that it provided in the constitution for the creation of a permanent Election Commission with plenary powers, sheltered from interference by courts during elections, and a Chief Election Commissioner removable only by impeachment in parliament - in other words, for a permanent, powerful and independent Election Commission.

The Commission's functions were to prepare and revise electoral rolls and superintend, direct and control elections to parliament, state legislatures and the offices of the President and Vice-President of India. Its unvarying objective was to provide free and fair elections. How has the Election Commission performed these near- 60 years? With all its limitations, it has grown to be the most respected public institution in the land, and by and large has measured up to expectations. I hope to describe to you how it has got there, particularly on how it has become so independent.

The Election Commission grew up in one of these unobtrusive hutments auxiliary to the Central Secretariat of Lutyen's New Delhi. Taking advantage of a spurt in official building activity to house the new ministries and offices of independent India, the Election Commission found space in what is now known as Nirvachan Sadan on Ashoka road. But it was with other offices earlier, which were evicted once it had enough power to do so.

In its minority the Commission was just a sibling of the ministry of law, given barely enough money to run its household, and required to take sanction even to serve tea to visiting foreign delegations. Then CEC (Chief Election Commissioner) Seshan, who had been Cabinet Secretary and was used to bullying the tribe of secretaries to the Government of India,

wrested from the authorities the same financial powers as enjoyed by the Supreme Court. From then onwards the funds also came plentifully. However, the Election Commission budget is still voted.

Article 324 (2) stipulates that the Chief Election Commissioner is to be appointed by the President, subject to provisions of any law made by parliament on that behalf. But the political executive, while it has appointed as CEC some outstanding persons like Sukumar Sen of the ICS, has intentionally left a loophole to secure pliant CECs by making sure that no such law is passed in the parliament. So, the President continues to appoint CECs on the recommendation of the Union Council of Ministers. Yet curiously - perhaps because of the hurly-burly of elections, the clash of egos, and the need for credible elections in order to be able to govern such a large and diverse country- most of the CECs have been quite independent. Contrary to what the media would have us believe, the Election Commission is not just about Seshan and me and how we fought the government. There were earlier and equally prominent conflicts between the Chief Election Commissioner and the political executive. In 1981, H.N. Bahuguna, who had left the Congress and sought to prove that he could win an election on his own, stood as an independent candidate in the Garhwal parliamentary constituency. Indira Gandhi, vindictive and determined that he should lose, suddenly flooded the constituency with Haryana policemen, that even the Collector and SP were taken by surprise. Shakti, the then CEC, declared the election null and void on the ground that excess police force was there to overawe the electorate and rig the election. He made the frenzied politicians wait, and had the elections the following year, by which time things had cooled down. Much to Indira Gandhi's annoyance Bahuguna won the election. Shakti was also an innovator who teamed with the Electronics Corporation of India to bring out the 'Electronic Voting Machine'. The machine had to be run experimentally in some election or other after it had been proved technologically. Shakti had written to Indira Gandhi to amend the Representation of the people Act 1951 to allow the use of EVMs as an alternative to ballot papers and boxes, to which she had turned a deaf ear. After a decent interval, 50 EVMs were used in the Paravur bye-election of Kerala in 1982.

Another CEC, Peri-Sastri clashed with Rajiv Gandhi over the Haryana assembly elections in 1987. President Zail Singh, whom Rajiv Gandhi could not stomach, planned to stand for re-election as President. According to schedule, the Haryana elections were to have preceded the Presidential Elections, and the congress was expected to get a drubbing in Haryana. This would have been to Zail Singh's advantage, since he would have got some support from the new MLAs of Haryana. Rajiv Gandhi determined to deprive Zail Singh of any support from Haryana asked the CEC to have the Presidential Election before the Haryana elections. But Peri-Sastri stood his ground and got the Haryana elections done first. This was despite personal harassment in terms of the government's trying to find fault with his property and income tax returns. After people like Shakti and Peri-Sastri, the Election Commission started fixing the dates of elections in consultation with all the stakeholders, instead of taking dates from the government.

Status-wise, until the Election Commissioners (Conditions of Service) Act 1991, the CEC was just equivalent to a Secretary to the Government of India. The 1991 legislation was tailor-made for Seshan who, as Cabinet Secretary earlier, was already in the pay scale of

a judge of the Supreme Court. The Act formalised the pay parity while adding the perks of a Supreme Court judge. It also fixed the CEC's tenure at 6 years subject to his retiring at 65. But the CEC's status was not an important issue. As I have mentioned already, the CEC had asserted his independence even when he was equivalent to a Secretary in the Government of India.

The Election Commission consists of some 300 functionaries in Delhi. For country-wide general elections the requirement of polling officials alone is over 3 million. It would have been absurd to have the Commission appoint millions of officers just to conduct elections. Quite rightly therefore, the Election Commission conducts elections using the services of state government employees, but considers them on deputation to itself and subject to its discipline. However, the Commission has had to improvise in order to enable the impartiality of state government officers on poll duty. Polling officers are selected at random by the computer for different polling stations. In very difficult circumstances, as in Kashmir 2002, polling personnel have also been brought in from other states. Senior field officers showing partisan leanings or with a questionable background have been transferred by the Commission prior to elections. But the Commission's primary grip on the administrative apparatus of the state government is secured through the Chief Electoral Officer. He is a senior Secretary-level officer of the state government on long-term deputation to the Election Commission, and owing loyalty to the Commission rather than the State Government. Initially, the state government in consultation with the Election Commission appointed the CEO. Later, it was just the other way around after a trial of strength between the two institutions.

But how do you conduct credible elections without a sizeable police force and senior officers to act as observers? The union and state governments maintained it was their prerogative and not the Commission's to decide what forces and officers were needed. The Commission's position was, give us what we need for, we conduct no more elections. Fortunately the Supreme Court intervened and asked the Government of India to comply.

The problem did not end with securing services of reliable personnel to conduct the elections. There was a big hole in the electoral legislation viz. the Representation of the People Act 1951. The Act does not contain any chapter on political parties whereas it is they that compete in the elections and come to power. In a country with so much illiteracy, political parties in the elections have had to be identified with different symbols. The Commission has had to evolve objective criteria for deciding, from time to time, which parties would be considered national parties, regional parties and local parties. A national party would get one symbol for the whole country, a regional party one symbol for a region, and a local party one symbol for the state in which it was located. The codification of the criteria for the reservation and allotment of symbols and the recognition of different categories of political parties was consolidated in the Election Symbols (Reservation and Allotment) Order 1968. Later this order included the registration of political parties, registration being made a precondition for getting recognised and obtaining a symbol.

The Commission also had to virtually sub-legislate to secure reasonable conduct from political parties, particularly those in power, during the elections. This was necessary because the law is only aimed at individual offenders, and not corporate entities. Left to itself, the

government of the day would have enormous advantages over the opposition while fighting an election-misusing public fund, misusing the police force etc. So, the Election Commission evolved a code of conduct for all political parties, its essential focus being to reduce the government of the day to the level of its competitors, to the extent possible. So, no misuse of government funds for advertisements, no new schemes and projects, no patronage appointments and so on. Ministers electioneering can do so only as ordinary citizens in private vehicles, cannot use government rest houses unless by turn (other parties are allowed to use the same facilities). Local officers, particularly the Collector and SP are not allowed to call on the minister while the code of conduct is in force. The use of government planes is especially prohibited; politicians of all levels now hire private helicopters. The code of conduct is now informally recognised by all courts, many politicians have contested it and not succeeded.

Whenever elections are mentioned people also talk of electoral reforms, because they are frustrated that reforms do not happen. Electoral reforms usually involve corrective legislation, which the politicians have been steadfastly resisting. The useful electoral reforms, which have been introduced have all, come from the Election Commission. I have mentioned many of them so far, such as creating reliable electoral machinery in the field, sub-legislation regarding political parties etc. I have also mentioned the technological change made by introducing Electronic Voting Machines. The other technological aspects are ID cards and computerisation of electoral rolls.

You have heard of the affidavit, which every candidate now has to file, regarding his assets and liabilities, involvement in criminal cases, qualifications etc. The first affidavit was the work of the Commission acting on its own. Subsequently, civil society and the Supreme Court refined it.

So much is spoken about state financing of elections. The Commission realised that in modern day elections the highest expenditure is on media coverage. So it had been giving free time on Doordarshan and All India Radio to political parties, the time allotted to each depending on whether they were national or regional parties, which in turn is determined by their share of the votes polled in the previous election at the national or regional level.

The Commission's improvisations in difficult circumstances have eventually become electoral reforms. In the 2002, Jammu and Kashmir elections, the Commission soon perceived that the main obstacle to good elections was ex-militants. Ex-militants surrender without conditions, become the property of the police, and are used for various purposes from combating militants, to bumping off people the police ask them to, or providing fodder for fake encounters. In fact, the Commission found them used for threatening opposition candidates too and from preventing them from campaigning. The crowning irony was that an ex-militant also eliminated the then Jammu and Kashmir Home Minister. The trouble was some ex-militants were with the State Government and others with the army, and both denied having any. It was left to the Commission to make its own exhaustive inquiries to get the names of the ex-militants and the details of their handlers. Ultimately, they were all confined to barracks. So the Commission assumed policing of the most dangerous kind in circumstances where the Government of India and State Government were helping the party in power.

There is also the useful precedent of using diplomats in Delhi as informal observers in elections. They are much more understanding and perceptive than formal foreign observers.

The Commission's hunger for innovations and improvements has continued till the present. The Bihar assembly elections of 2005 were the best in the State in recent times. 50,000 non-bailable warrants were issued against criminals. Special software was created to detect similar names in the electoral roll and delete duplicates. To prevent booth capturing, results of past elections were studied, and the polling stations that showed 80% voting (very unlikely to have been genuine with averages round about 50%) they were brought to the special attention of polling parties and observers.

The UP assembly elections in 2007 were equally impressive. Sex ratios of polling stations were compared with the district ratios to unearth female voters. Polling stations with a substantial number of migrant labour voters were singled out, with specific details circulated to the polling staff and observers to prevent the kind of impersonation traditional in these polling stations. There was also a vulnerability mapping of areas usually experiencing the intimidation of weaker section voters. Here again the observers and polling parties were alerted.

In the 2009 general election the Commission had appointed booth-level officers i.e. officers responsible for the fidelity of the electoral rolls of their booths, throughout the country. Vulnerability mapping was extended to the whole country. There was a countrywide mapping of communication assets-mobile phones, landline phones, high frequency and very high frequency communication, satellite phones etc. to achieve connectivity to polling stations. Logistics wise the Railway Board provided special trains for the transport of polling staff and security forces. There was also an arrangement with the Indian Air Force and Air India to fly over Bangladesh carrying personnel and material. 1,40,000 micro observers were posted in selected polling stations to observe the proceedings from within. Ramps and Braille-enabled EVMs were used for physically challenged voters.

Nevertheless, the old bete noires of the Election Commission remain. Limitless expenditure, the bribing of voters, criminality, and the restricted freedom to vote in ever-larger parts of the country, particularly those affected by militancy. This by itself is a topic worthy of a full chapter.

I would like to end by referring to Frank Vibert in 'The Rise of the Unelected' in which he shows that in Western democracies the political executive has realised that it has neither the time nor the inclination to handle complicated matters, and has therefore found it convenient to farm out these activities to an increasing number of bodies of unelected experts. One can see the same trend in India. The most outstanding of these is the Central Information Commission, which has made inroads into the secrecy surrounding judges' personal assets. Institution building, which is the subject of this talk, is going to be of increasing relevance in the future of this country.

Author's Profile

The author is the former **Chief Election Commissioner of India** (June 14, 2001 to February 7, 2004 and was awarded the '**Ramon Magsaysay Award**' for Government Service in 2003.