Defining the Extent and Nature of ECI's Powers

What is the issue?

- With recent assembly elections in some states, the role of Election Commission of India (ECI) is again into sharp focus.
- It becomes imperative to reflect on the confusion about the extent and nature of the powers that are available to the Election Commission.

How has the ECI's role and powers evolved?

- Interestingly, in the ECI's history, before T.N. Seshan came on the scene as the Chief Election Commissioner, no one ever knew or felt that the ECI had any powers.
- Seshan discovered the ECI's powers hidden in Article 324 of the Constitution.
- It was then used to discipline unruly political parties which had till then believed that it was their birth right to rig elections.
- From then on, there was a very high level of confidence about the ECI's role restoring the purity of the elected legislative bodies in the country.
- It became easier for Seshan to locate the powers of the ECI after the Supreme Court's ruling in Mohinder Singh Gill vs Chief Election Commissioner (AIR 1978 SC 851).
- The Court ruled that Article 324 contains plenary powers to ensure free and fair elections.
- These are vested in the ECI which can take all necessary steps to achieve this constitutional object.
- All subsequent decisions of the SC reaffirmed Gill's decision.
- Thus, the ECI was fortified by these court decisions in taking tough measures.

How does the model code of conduct work?

- The model code of conduct issued by the ECI is a set of guidelines.
- This is meant for political parties, candidates and governments to adhere to during an election.
- This code is based on consensus among political parties.
    - Its origin can be traced to a code of conduct for political parties prepared by the Kerala government in 1960 for the Assembly elections.

    - It was adopted and refined and enlarged by the ECI in later years.
    - It was enforced strictly from 1991 onwards.
- The code has been issued in exercise of ECI's powers under Article 324.
- Besides the code, the ECI issues from time to time directions, instructions and clarifications on issues that crop up in the course of an election.

What are the grey areas?

- The model code is observed by all stakeholders for fear of action by the ECI.
- However, there exists a considerable amount of confusion about the extent and nature of the powers of ECI in enforcing the code as well as its other decisions in relation to elections.
- 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.
- **Legal backing** - A committee of Parliament recommended that the code should be made part of the Representation of the People Act 1951.
- But, the ECI did not agree to it.
- This is because once it becomes a part of law, all matters connected with its enforcement will be taken to court, which would delay elections.
- The position taken by the ECI is sound from a practical point of view.
- But then, the question about the enforceability of the code remains unresolved.
- Moreover, the commission may suspend or withdraw recognition of a recognised political party if it refuses to observe the model code of conduct.
- Paragraph 16A of the Election Symbols (Reservation and Allotment) Order, 1968 mentions this.
- But it is doubtful whether this provision is legally sustainable.
- Because, withdrawal of the recognition of a party recognised under these orders seriously effects the functioning of political parties.
- When the code is legally not enforceable, the ECI resorting to a punitive action such as withdrawal of recognition is arbitrary.
- Besides these, there are two crucial issues which need to be examined in the context of the model code and the exercise of powers by the ECI under Article 324:

1. Transfer of officials
2. Administrative moves

What is the role in transfer of officials?

- Abrupt transfer of senior officials working under State governments by an order of the commission is evident.
- Probably, the observers of the ECI report to it about the conduct of certain

officials of the States where elections are to be held.
- The ECI apparently acts on such reports.
- It thus orders the transfer on the assumption that the presence of those officials will adversely affect the free and fair election in that State.
- **Procedure** - 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 exercise of the general powers under Article 324 or under the model code.
    - The code does not say what the ECI can do; it contains only guidelines for the candidates, political parties and the governments.
    - Further, Article 324 does not confer unhampered powers on the ECI to do anything in connection with the elections.
- **Supreme court** - 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.
- This cannot be bypassed by the ECI under the purported exercise of power conferred by Article 324.

How is ECI's interference in the administrative moves?

- Another issue relates to the ECI's intervention in the administrative decisions of a State government or even the union government.
- According to the model code, Ministers cannot -
    i. announce any financial grants in any form
    ii. make any promise of construction of roads, provision of drinking water facilities, etc
    iii. make any ad hoc appointments in the government, departments or public undertakings
- But in reality, no government is 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.
- **Recent case** - ECI's recent decision to stop the Kerala Government from continuing to supply kits containing rice, pulses, cooking oil, etc is a case in point.
- The State government has been distributing such free kits for nearly a year to meet the situation arising out of the pandemic.
- The decision to stop it was reportedly on a complaint from the Leader of the Opposition in the Assembly.

- The question now is whether the ECI could have taken such a decision either under the model code or Article 324.
- The model code does not provide any clue.
- As regards Article 324, the key question is whether distribution of food items to those in need in a pandemic will affect free and fair elections.
- **SC ruling** - The Supreme Court had in S. Subramaniam Balaji vs Govt. of T. Nadu & Ors (2013) held the following.
- The distribution of colour TVs, computers, cycles, goats, cows, etc, done or promised by the government is in the nature of welfare measures.
- It is in accordance with the directive principles of state policy.
- Therefore, it is permissible during an election.
- So, in this line, the distribution of essential food articles which are used to stave off starvation cannot logically be an electoral malpractice.
- Further, Section 123 (2)(b) of the Representation of the People Act, 1951 says that 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.

What is to be ensured?

- Undoubtedly, the ECI, through the conduct of free and fair elections, has restored the purity of the legislative bodies.
- However, no constitutional body is vested with unguided and absolute powers.
- Neither citizens nor the ECI should be permitted to assume that the ECI has unlimited and arbitrary powers.

Source: The Hindu

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