

Why Resignation Is Not Enough To Make Constitutional Promises Credible

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The Election Commission of India (ECI) is the [guarantor](#) of the Constitution's promise to its citizens that country's elections will be free and fair. Allegations have abounded in recent years of its failure to provide this guarantee. The [Indian Express investigation](#) last month, however, gave us *prima facie* reasons to believe that Chief Election Commissioner (CEC) Gyanesh Kumar was not only failing to perform his constitutional duty, but also actively sabotaging it.

The report found that two of the three election commissioners (ECs) had formally objected at least 14 times in 10 months to decisions regarding the Special Intensive Revision (SIR) of electoral rolls taken without their knowledge, some of which they described as "unauthorised" and "illegal." The [commission responded](#) on September 23 that differing views were part of its deliberations and that its decisions had been unanimous and documented disagreements notwithstanding.

The opposition has decried Kumar's acts as treason. The Cockroach Janta Party (CJP) has [called for an independent investigation](#) and replacement of the 2023 appointments law for election commissioners, as well as Kumar's resignation.

Indeed, Kumar must resign and be investigated under [Section 32](#) of the Representation of the People Act, 1950 and section 171(1) of the [Bharatiya Nyaya Sanhita \(BNS\)](#), read with section 174 – provisions that concern the integrity of our elections. Any prosecution would need the requisite sanction under the 1950 Act and also overcome the arguably unconstitutional impunity provision under [Section 16](#) of the Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Act, 2023, which protects former as well as serving officeholders.

While individual accountability is important, it is clearly not enough. Without a robust independent framework for the appointment and accountability of [constitutional guarantors](#) – senior judiciary, election commissioners, information commissioners, lokpal, attorneys general, solicitors general, state governors, heads of police and prosecutorial services, military leaders and other appointed constitutional and statutory offices – any constitutional guarantee will remain only as good as the constitutional civility of the government of the day.

The state does not belong to the government

Noted Polish-American political scientist Adam Przeworski defined a democracy as “a system in which parties lose elections”. The distinction between the state, that endures, and governments, which come and go, is central to the concept of a democracy. Democratic constitutions need a number of independent constitutional guarantor institutions to ensure that this distinction is not erased.

In a [2019 column](#), I had outlined the contours of an Independent Institutions Bill with three objectives: multi-partisan appointments; operational independence and impartiality; and accountability to the political opposition. It addressed not just who selects an officeholder, but also tenure, resources, removal and subsequent public appointments.

Also read: [Plea in Supreme Court Seeking Directions to Delhi Police as Manhandling, Detentions in Unmarked Cars Mark Protests](#)

The proposal relied on Independent Institutions Committees in parliament and state legislatures. Parliamentary committees would have two nominees from the governing side (including parties supporting the government from outside) and one nominee from each of the three largest opposition parties. State committees would have one government nominee and nominees from the two largest opposition parties. A united opposition could therefore defeat the government, requiring it to obtain some support beyond its own side.

Legislative appointments committees are not the only possible model. [Sri Lanka's constitutional council](#) has appointment-related responsibilities across several independent commissions and senior constitutional offices. Its membership includes political officeholders and parliamentarians, alongside three non-parliamentary members nominated by the speaker with the agreement of the prime minister and opposition leader. It illustrates a common appointments framework covering multiple institutions, although its precise composition is different from the committees proposed here.

[The 2019 proposal](#) and the Sri Lankan approach could serve as starting points for a debate on how to make the constitution's promises credible. The following principles should inform public debate on what an Independent Institutions Bill might look like.

Ten principles for an Independent Institutions Bill

1. *No unilateral appointments by the ruling party.* The governing party or coalition of the day should not be able to secure an appointment against a united opposition. Each appointment must require support from at least a section of the opposition. Interim appointments, quorum rules, casting votes, vacancies and deadlock procedures must be subject to the same constraint, rather than providing alternative routes to unilateral selection by the government.
2. *Bicameral and federal participation.* Participation should extend beyond the government and the largest opposition party, allowing regional parties a role. The 2019 proposal divided shortlisting and final selection between committees: the Rajya Sabha committee would prepare shortlists, while the Lok Sabha committee would make central appointments and the relevant state assembly committee would make state-level appointments. Judicial appointments would require separate arrangements (see principle 9).
3. *Open, consultative, and timely selection.* Vacancies in any guarantor institution should be advertised in advance and candidates assessed against published criteria, following consultation with relevant institutions, experts, and affected groups. The 2019 outline proposed advertising three months before an anticipated vacancy. Deadlines and responsibility for missed appointments should be specified. Any member of the relevant committee should be able to initiate the process of filling a vacancy, so that doing nothing is not an option. Committees should decide among shortlisted candidates by single-transferable vote, which tends to favour candidates with broad support and reduces the risk of deadlock.
4. *Secure tenure and a defined removal process.* Appointments of constitutional guarantors should carry fixed terms, irrespective of any change in the government. The 2019 proposal provided for an independent inquiry establishing a specified breach and a heightened voting threshold for removal. Office-specific provisions must preserve existing constitutional protections and distinguish removal for misconduct from disagreement with an institution's lawful decisions.
5. *Operational independence backed by resources.* Salaries, staffing and other institutional resources of constitutional guarantors should receive statutory protection, alongside enforceable protection from executive interference. Transfers and interim appointments should come within the multi-partisan process. The appointments bodies themselves would also need staff and resources to scrutinise candidates and discharge their oversight functions.

6. *Collective institutional decision-making.* In commissions and comparable multi-member bodies, decisions should belong to the governing body rather than the chief officer acting alone. The legislation should specify how disagreements are resolved. Different provisions would be necessary for single-officeholder institutions.
7. *Restrictions on subsequent public appointments.* The act should remove the corrupting influence of any post-retirement reward. The 2019 outline proposed ineligibility for further public office after an appointee stepped down, apart from promotion within the institution. A less severe alternative might be a temporary cooling-off period, with any subsequent appointment subject to the approval of the relevant Independent Institutions Committee. Consultation should examine how such a restriction would apply to different offices, including its implications for recruitment and professional careers.
8. *Public accountability without ministerial direction.* Institutions should publish regular reports, with officeholders and senior staff answering questions in public legislative hearings. The 2019 outline envisaged annual televised hearings and additional questioning on particular matters before multi-partisan standing committees. These mechanisms should scrutinise institutional work without giving ministers authority to direct individual investigations, electoral decisions, or other protected functions.
9. *Comprehensive coverage, with office-specific safeguards.* The legislative framework should encompass all constitutional guarantor offices, from election commissioners and public service commissioners to the comptroller and auditor general and governors, alongside statutory institutions with comparable responsibilities (such as the Information Commission). Judicial appointments would require judicial involvement and preservation of judicial independence. Comprehensive coverage need not imply identical appointment, removal, or supervision arrangements for every office.
10. *Consultation before enactment.* Detailed published proposals must precede legislation, with the government taking the opposition into confidence before settling the design. Consultation must include states, citizens, institutional staff, professional bodies, and constitutional experts. The bill should receive full parliamentary scrutiny, including consideration by a committee.

An ordinary act would not accomplish every part of this proposal.

[Article 324](#) expressly contemplates parliamentary legislation concerning ECI appointments. Governors' appointment and tenure are separately governed by Articles 155 and 156, including tenure during the president's pleasure. Altering some of these constitutional arrangements may require the appropriate constitutional

amendments, although statutes regulating how the president's pleasure is exercised may be permissible.

In the civil-service context, the Supreme Court distinguished procedural regulation from abridgement of the pleasure doctrine in [Union of India v Tulsiram Patel](#) (1985), and in [B.P. Singhal v Union of India](#) (2010) the court held that governors cannot be removed arbitrarily or for partisan reasons. How far the logic of these judgments might extend to a legislation incorporating the principles outlined above remains to be seen.

Grasp the moment

In 2020, I had explained how the constitution underwent an attempted [killing by a thousand cuts](#) during the first term of Prime Minister Modi from 2014 to 2019.

Also read: [The Force of the State Versus the Force of Truth](#)

In subsequent years, the cuts have become deeper and still more numerous, so much so that in January 2022 activist and political scientist Yogendra Yadav declared the first republic established by our constitution of 1950 “[all but dead](#).”

The CJP movement is an important moment of reckoning for India's democracy. The regime may well be compelled to grant protestors the head of an individual minister or official. But could it be compelled to start healing the wounds it has itself inflicted on the body politic? We must at least ask.

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