CHAPTER - IV

MECHANISM FOR FREE AND FAIR ELECTIONS

INTRODUCTION

There are three main ingredients in a truly democratic electoral system—an awareness on the part of the public of the significance of their vote, a spirit within the community that looks towards the welfare of, and a sound electoral machinery. A constitution or the laws can provide only one of these ingredients—the system through which the people can give effect to the other two.

In the following pages an effort has been made to find out what machinery the Constitution has devised for the purpose of conducting free and fair elections, and to make an assessment of its efficacy as an institution.

The chief electoral authority is the Election Commission, with its headquarters at New Delhi. In the Commission is vested complete power to superintend, direct and control the entire elections. This power is to be exercised in accordance with the provisions of the Constitution and the Representation of the people Acts, 1950 and 1951.
THE ELECTION COMMISSION

The Committee on Fundamental Rights had made a report that it should be recognised that the independence of the elections and the avoidance of any interference by the executive in the elections to the legislature should be regarded as a fundamental right and provided for in the chapter dealing with Fundamental Rights. The Constituent Assembly agreed that the question of fair elections was a matter of great importance but it was not in favour of embodying a right to that effect in the chapter dealing with Fundamental Rights. Accordingly, the Drafting Committee removed the matter from the category of Fundamental Rights and put it in a separate part.

When the matter came up for discussion in the Constituent Assembly Dr. Amedkar, the Chairman of the Drafting Committee explained that there were two alternatives before the Drafting Committee: (a) to have a permanent body consisting of four or five members of the Election Commission who would continue in office throughout without any break, or (b) to permit the President to have an ad hoc body appointed at the time when there is an election on the anvil. The Committee steered a middle course. What it purported was to have permanently in office one man called the Chief Election
Commissioner, so that the skeleton machinery would always be available. The Committee's view was based on the assumption that though elections would generally take place at the end of five years, a bye-election might have to be conducted and consequently, the electoral rolls would have to be kept up-to-date all the time. The Assembly agreed to accept the Committee's recommendations that there should be permanently in session one officer to be called the Chief Election Commissioner, with a power with the President to further add to the machinery by appointing other members to the Election Commission.

Dr. Ambedkar further observed that the original proposal was that there should be one Commission to deal with the elections to the Central Legislature, both the upper and the lower House, and that there should be a separate Election Commission for each province and each State, to be appointed by the Ruler or the Governor of the State. Comparing the original proposal with the present Article 289, Dr. Ambedkar said: "This article proposes to centralise the election machinery in the hands of a single Commission to be assisted by regional Commissioners, not working under the provincial government, but working under the superintendence and control of the Central Election Commission. This is
undoubtedly a radical change. But, this change had become necessary because we find that in some of the provinces of India, the population is a mixture. There are what may be called original inhabitants, so to say, the native people of a particular province. Along with them, there are other people residing there, who are either racially, linguistically or culturally different from the dominant people who are the occupants of that particular province. It has been brought to the notice of both of the Drafting Committee as well as of the Central Government that in these provinces the executive Government is instructing or managing things in such a manner that those people who do not belong to them either racially, culturally or linguistically, are being excluded from being brought on the electoral rolls. The House will realise that franchise is a most fundamental thing in a democracy. No person who is entitled to be brought into the electoral rolls on the grounds which we have already mentioned in our Constitution, namely, an adult of 21 years of age, should be excluded merely as a result of the prejudice of a local Government, or the whim of an officer. That would act at the very root of democratic government. In order, therefore, to prevent injustice being done by provincial governments to people other than those who belong to the province racially, linguistically and culturally, it is
felt desirable to depart from the original proposal of having a separate Election Commission for each province under the guidance of the governor and the local government. Therefore, this new change has been brought about, namely, that the whole of the election machinery should be in the hands of a Central Election Commission which alone would be entitled to issue directives to returning officers, polling officers and others engaged in the preparation and revision of electoral rolls so that no injustice may be done to citizen in India, who under this constitution is entitled to be brought on the electoral rolls. That alone is, if I may say so, a radical and fundamental departure from the existing provisions of the Draft Constitution.

COMPOSITION AND APPOINTMENT

Article 324, Clauses (2), (3) and (4) of the Constitution provide:

The Election Commission shall consist of the Chief Election Commissioner and such number of other Election Commissioners, if any, as the President may from time to time fix and the appointment of the Chief Election Commissioner and other Election Commissioners shall, subject to the provisions of any law made in that behalf by Parliament, be made by the President.
When any other Election Commissioner is so appointed the Chief Election Commissioner shall act as the Chairman of the Election Commission.

Before each general election to the House of the People and to the Legislative Assembly of each state, and before the first general election and thereafter before each biennial election to the Legislative Council of each State having such Council, the President may also appoint after consultation with the Election Commission such Regional Commissioners as he may consider necessary to assist the Election Commission in the performance of the functions conferred on the Commission by clause (1).

Thus the chief features of the composition of the Election Commission as given under Article 324 are that the Commission shall always consist of a permanent incumbent, viz, the Chief Election Commissioner. The President has also been given the power to appoint such number of other election commissioners as he may, from time to time, fix. In other words, while the appointment of the Chief Election Commissioner is a must, the appointment of the other election Commissioner or Commissioners is not obligatory. Moreover, the number of other election commissioners to be appointed in future is left to the discretion of the President depending upon the
need felt from time to time.

A perusal of Article 324, it has been rightly
pointed out, reveals that the constitution neither prescribes
any qualification — administrative, legal or judicial — for eligibility to the post of Chief Election Commissioner nor does it lay down the procedure of his appointment. **5**

**TERM OF OFFICE AND CONDITION OF SERVICE**

In connection with the term of office and service condition, Dr. Ambedkar, in the Constituent Assembly, observed that the matter had been left to the President to determine the condition of service and the tenure of office of the members of the Election Commission, subject to one or two conditions that the Chief Election Commissioner would not be liable to be removed except in the same manner as a judge of the Supreme Court. He explained that if the object of the House was that all matters relating to elections should be outside the control of the Executive Government of the day, it is absolutely necessary that the Election Commissioner should be irremovable by the executive by a mere fiat. **6** Hence the Chief Election Commissioner has been given the same status so far as removability is concerned as it has been given to the judges of the Supreme Court. **7** "We, of course, do not propose to give the same status to the other members of
the Commission. We have left the matter to the President as to the circumstances under which he would deem fit to remove any other member of the Election Commission, subject to one condition that the Chief Election Commissioner must recommend that the removal is just and proper".  

Artical 324, clause (5) of the Constitution lays down that subject to the provisions of any law made by parliament, the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners shall be such as the President may by rule determine. This is with the condition that the Chief Election Commissioner shall not be removed from his office except in like manner and on the like grounds as a judge of the Supreme Court and the conditions of service of the Chief Election Commissioner shall not be varied to his disadvantage after his appointment. The Article further provides that any other Election Commissioner or a Regional Commissioner shall not be removed from office except on the recommendation of the Chief Election Commissioner.

It has been pointed out that the method of removal of Chief Election Commissioner is similar to that of the judges of Supreme Court, or the High Court, is undoubtedly
very complicated, but his tenure is not similar to that of a judge. A Supreme Court judge holds office till the completion of a definite age, i.e., sixty five years, but the tenure of the Chief Election Commissioner depends upon the rules framed by the President and is subject to statutory regulations. Till 1972, he could be appointed for any period of time. His tenure could also be further extended. For example, in the cases of two former Chief Election Commissioners, Sukumar Sen and K.V.K. Sundaram, both of whom held office for approximately eight years, though initially each of them had been appointed for a period of five years only. In 1972 the terms and conditions of service for the post of Chief Election Commissioner were prescribed by rules made by the President. As per these rules, the Chief Election Commissioner holds office up to the age of sixty five or for a period of five years, whichever is less.

However, recently the Government of India has enacted the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991. Section 4 of the Act prescribes that the Chief Election Commissioner or an Election Commissioner shall hold office for a term of six years from the date on which he assumes his office: Provided that where ___
(i) The Chief Election Commissioner attains the age of sixty-five years; or

(ii) An Election Commissioner attains the age of sixty-two years, before the expiry of the said term of six years, he shall vacate his office on the date on which he attains the said age.

It has been further provided that the Chief Election Commissioner or an Election Commissioner may, at any time, by writing under his hand addressed to the President, resign his office. The term of six years in respect of the Chief Election Commissioner or an Election Commissioner holding office immediately before the commencement of this Act, shall be computed from the date on which he had, assumed office.

As far as appointment and removal of an Election Commissioner is concerned, it gained significance when in 1989 for the first time two Election Commissioners were appointed by the President and subsequently, their services were terminated. The matter was challenged before the Supreme Court in S.S.Dhana v. Union of India. The facts of the case were that on 7 October, 1989, by a notification issued in exercise of the powers conferred by Cl. (2) of Article 324 of the Constitution, the President fixed, until further orders, the number of Election
Commissioners (other than the Chief Election Commissioner), at two. By a subsequent notification of 16 October, 1989 issued under the same provisions, the President appointed the petitioner and one V.S. Seigell as Election Commissioners from that very date. On the same day, the President made rules to regulate the conditions of service and tenure of office of the Election Commissioners. These conditions laid down, among other things, that an Election Commissioner shall hold office for a term of five years or until he attains the age of sixty-five years whichever happens earlier.

On 1st January, 1990, in exercise of the powers conferred under Article 324(2) of the Constitution, the President issued two notifications—one rescinding, with immediate effect, the notification of 7 October, 1989, creating the two posts of Election Commissioners and another rescinding, with immediate effect, the notification of 16 October, 1989, by which the appointment of the petitioner and V.S. Seigell was made. It was these two notifications of 1st January 1990 which were challenged before the Court. The grounds of attack, inter alia, were that once appointed, an Election Commissioner continues in office for his full tenure determined by the rules made under Article 324 (5) of the Constitution which is five years or till the attainment of sixty-five years.
of age whichever is earlier. The President could remove
the petitioner only on the recommendation of the Chief
Election Commissioner. He had otherwise no power to cut
short the tenure either under the Constitution or under
the rules. Hence, it was contended, the recission of the
notifications of 7th and 16th October, 1989, by the
impugned notifications of 1st January, 1990, was illegal.

The Supreme Court held that it was a clear case of
the abolition of posts and the termination of the service
of the Election Commissioner was a consequence thereof.
Hence, the termination of service was not open to
challenge on the ground of illegality. In the opinion of
the Court the creation and abolition of post was the
prerogative of the executive. Article 324 (2) leaves it to
the President to fix and appoint such number of Election
Commissioners as he may from time to time determine. "The
power to create the posts is unfettered. So also is the
power to reduce or abolish them."\(^{15}\)

The Court further pointed out that if the President
finding that there was no work for the Election
Commissioners or that the Election Commission could not
function, decided to abolish the posts, that was an
exigency of the office held by the Election Commissioner.

As far as the appointment of Regional Election
Commissioners as provided for under Article 324 (4) is
concerned, the President sanctioned four posts for the First General Elections, 1951-52. However the system of Regional Commissioners was discontinued at the time of the Second General Elections. The Joint Committee on Amendments to Election, however, recommended the appointment of Regional Election Commissioners on the ground that "there are so many matters on which orders of the Election Commission are necessary under the provisions of the election laws and it is not possible for the Election Commission at Delhi to take prompt and appropriate steps without the first hand knowledge at their disposal".

For the first time in 1956, a new post of Deputy Election Commissioner was created replacing Regional Election Commissioners. Three Deputy Election Commissioners were appointed for the Second General Elections for a period of six months. One of these posts was subsequently retained on a permanent basis.

For more effective and efficient functioning of the Election Commission, the Joint Committee on Amendments to Election Law recommended its expansion into a multi-member body as laid down in Article 324(2) of the Constitution. Its recommendation was: "An enlarged Commission will be able to discharge more effectively the responsibilities
relating to elections and in exercise of its quasi-judicial functions, a broad-based Commission is likely to reach generally acceptable decisions and command respect. To the same effect is the suggestion given by the Supreme Court in S.S. Dhanoa. Sawant, J., speaking for the division bench, held that two heads are better than one, and particularly when an institution like the Election Commission is entrusted with vital functions, and is armed with exclusive uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however, all-wise he may be. "However, the fact remains that where more individuals than one, man an institution, their roles have to be clearly defined, if the functioning of the institution is not to come to a naught."

STAFF FOR CONDUCTING ELECTIONS

One of the questions before the Constituent Assembly was whether the Commission should have authority to have an independent staff of its own to carry on the work which had been assigned to it. It was felt that to allow the Election Commission to have an independent machinery to carry out all the work of preparation of the electoral rolls, the revision of the rolls, the conduct of the elections and so on would be really duplicating the
machinery and creating unnecessary administrative expense which could be easily avoided\textsuperscript{22}. Dr. Ambedkar observed that the work of the Electoral Commission might be at times heavy and at other times it might have no work. Therefore it should be open for the Commission to borrow from the provincial government such clerical and ministerial agency as might be necessary for the purposes of carrying out the functions with which the Commission had been entrusted\textsuperscript{23}. When the work was over, the ministerial staff would return to the provincial government. During the time that it was working under the Electoral Commission no doubt administratively it would be responsible to the Commission and not to the executive government\textsuperscript{24}. R.K. Sidhva (C.P. and Berar) argued that separate staff was essential for securing independence and impartiality of the Election Commission. He insisted that the staff of the Central and State Governments, temporarily placed under the supervision and control of the Election Commission for the period of election, would otherwise be responsible to the executive and would act according to the wishes of the executive\textsuperscript{25}. The member argued that although maintaining of separate staff would be very expensive, the suggested system would be nearer to perfection\textsuperscript{26}. The proposition that the EC should have an independent staff cadre of its own did not find
favour with the Assembly, which ultimately adopted the suggestion put forward by Dr. Ambedkar.

The Constitution under Article 324, clause (6), accordingly provided: The President or the Governor of a State, shall when so requested by the Election Commission, make available to the Election Commission or to a Regional Commissioner such staff as may be necessary for the discharge of the functions conferred on the Election Commission.

**MACHINERY AT STATE LEVEL:**

There is for each State a chief electoral officer who is such officer of government as the Election Commission may in consultation with that government designate or nominate. An executive or judicial officer of the State cadre "with necessary background and independent training" is usually picked up for this post. The duties of the Chief Electoral Officer are to supervise the preparation of the electoral rolls and the conduct of elections in the State. In discharging his duties, he functions under the authority and control of the Election Commission. Every Chief Electoral Officer in a State is assisted by a permanent and whole-time deputy who is incharge of the office and maintains continuity of supervision and control. The organisation
and administrative structure of the office of the Chief Electoral Officer varies from State to State depending upon the size of the State and the volume of work involved. The office of the Chief Electoral Officer generally forms part of the State Government Secretariat at the headquarters of the State. The Election Commission has, however, no say in the selection of the staff employed in the offices of the Chief Electoral Officers.

For each district in a State, other than a Union Territory, the Election Commission, in consultation with the Government of the State, designates or nominates a district election officer who is an officer of Government. The Election Commission may designate or nominate more than one such officer for a district if the Commission is satisfied that the functions of the office cannot be performed satisfactorily by one officer. Where more than one district election officers are designated or nominated for a district, the Election Commission also specifies the area in respect of which each such officer would exercise jurisdiction. The district election officer is subject to the superintendence, direction and control
of the Chief Electoral Officer. He co-ordinates and supervises all work in the district or in the area within his jurisdiction in connection with the preparation and revision of electoral rolls for all parliamentary, assembly and council constituencies within the district. He provides, with the prior approval of the Election Commission, the polling stations for every constituency, which lies within his jurisdiction. He appoints the presiding and polling officers for the various polling stations in the whole district. The accounts of election expenses are to be lodged with him. He is also the custodian of the papers relating to all elections held within the district after the completion of the election.

The responsibility to prepare and revise the electoral rolls of every constituency is vested in an officer called the electoral registration officer (ERO). An ERO may, subject to any prescribed restrictions, employ such persons as he thinks fit for the preparation and revision of the electoral rolls for the constituency. The Election Commission may appoint one or more persons as assistant electoral registration officer to assist any electoral registration officer in the performance of his functions.
The election in every constituency is supervised by an officer known as the Returning Officer nominated or designated by the Election Commission in consultation with the Government of the State. The same officer can be nominated as Returning Officer for more than one constituency. The Election Commission may appoint one or more persons to assist any returning officer in the performance of his functions. Every such person is an officer of Government or of a local authority. The returning officer receives the nomination papers of candidates in each constituency. He is the authority to scrutinise the nomination papers. His decision can be challenged only on an election petition after the election is over. He is also responsible for the counting of the votes and the declaration of the results.

In the Union Territories, the provision of polling stations and the appointment of polling personnel are entrusted to the returning officers, as there are no district election officers in these territories.

The staff for the actual conduct of the poll normally comprise one presiding officer and four or five polling officers. Their appointment is made by the district election officer. It is the general duty of the presiding officer at a polling station to keep order there.
at and to see that the poll is fairly taken. And it is the duty of the polling officers at a polling station to assist the presiding officer for such station in the performance of his function. Usually such polling personnel are drawn from central and state government employees, teachers of schools and colleges, etc. In case of absence of the Presiding Officer due to illness or some other cause, his duties are performed by one of the polling officers who is previously so authorised by the District Election Officer. The presiding officer occupies an important position in the electoral machinery of the country as he plays a key role on the day of the election. He keeps order at the polling station and ensures fair conduct of the poll.

The above discussion gives a picture of the entire electoral mechanism which the framers of the Indian Constitution provided for a free and fair election. The entire electoral administration has been vested in the Election Commission which alone has the authority to issue directions to the sub-ordinate staff engaged in the preparation and revision of electoral rolls and the conduct of elections. Hence from the Chief Electoral Officer down to the presiding officers everyone is accountable to the Election Commission. This electoral
machinery may be characterised as a bastion of democracy in India\textsuperscript{44}.

The electoral mechanism, in the words of Krishna Iyer J., may be summed up as: "The Super-authority is the Election Commission, the kingpin is the returning officer, the minions are the presiding officers in the polling stations and the electoral engineering is in conformity with the elaborate legislative provision\textsuperscript{45}.

\textbf{POWERS OF THE ELECTION COMMISSION: JUDICIAL DELIMITATION}

A leading case in which the Supreme Court examined the powers of the Election Commission at great length is \textit{Mohinder Singh Gill}\textsuperscript{46}. In order to appreciate the points it will be necessary to know the facts of the case.

In the general elections to Parliament held on March 16, 1977, the appellant and the third respondent were the principal contestants from 13-Ferozepore parliamentary constituency in Punjab which consisted of nine assembly segments. Voting and counting of votes took place as notified, but at the final stage of the counting, when postal ballots were being counted, its completion was aborted by muscle tactics, allegedly mobilised at the instance of the third respondent. The ballot boxes from the Fazilka segment were also done away with en route, and
the returning officer was terrified in to postponing the declaration of the result. An observer of the Election Commission was also present at the crucial stage of the counting. He as well as the returning officer submitted their respective reports to the Election Commission. The appellant met the Election Commissioner with the request that he should direct the returning officer to declare the result of the election. His contention was that he had a substantial lead over the respondent when the panicked opposite party halted the process by muscle tactics.

The Election Commission, however, issued an order cancelling the whole poll, and followed it up, a few days later, with a declaration to hold a fresh poll for the whole constituency. Thereafter, the appellant filed a writ petition before the High Court. In an affidavit filed by the Election Commissioner, it was stated that after taking into consideration all the circumstances and information including the oral representation of the appellant he had passed the order cancelling the poll. The High Court dismissed the petition on the ground that it had no jurisdiction to entertain it. An appeal was then filed before the Supreme Court. In the meantime, at the repoll the third respondent was declared elected and the appellant filed an election petition. The grievance of the
The Supreme Court held that the Constitution contemplates a free and fair election and vests comprehensive responsibilities of superintendence, direction and control of the conduct of elections in the Election Commission. This responsibility may cover power, duties and functions of many sorts, administrative or other, depending on circumstances. The court noted that at least two limitations are laid on the plenary character of the powers. Firstly, when Parliament or any State Legislature has made valid law relating to or in connection with elections, the Commission shall act in conformity with, not in violation of, such provisions. But where such law is silent Article 324 is a reservoir of power to act for the avowed purpose of, not divorced from, pushing forward a free and fair election with expedition. Secondly, the Commission shall be responsible to the rule of law, act **bona fide** and be amenable to the norms of natural justice.
Krishna Iyer J., who delivered the judgment on behalf of himself, Beg, C.J., and P.N. Bhagwati, J., observed that a repoll for a whole constituency under compulsion of circumstances may be directed and can be saved by Article 324 — provided it is *bona fide* necessary for the vindication of the free verdict of the electorate, and the abandonment of the previous poll was because it failed to achieve that goal.

The Court observed that Article 324 (1) is couched in very wide terms. The Commission may be required to cope with some situations which may not be provided for in the enacted laws and the rules. That seems to be the *raison d'être* for the opening clause in Article 327 and 328 which leaves the exercise of power under Article 324 operative and effective when it is reasonably called for in a vacuous area.

But where laws are non-existent, and yet a situation has to be tackled, then, according to Goswami, J., in a concurrent opinion:

> The Chief Election Commissioner has not to fold his hands and pray to God for divine inspiration to enable him to exercise his functions and to perform his duties or to look to any external authority for the grant of powers to deal with the situation. He must lawfully exercise his power independently, in all matters relating to the conduct of elections, and see that the election process is completed properly, in a free and fair manner.
About the maintainability of the writ petition, the Court held that under Article 329 (b) of the Constitution the sole remedy for an aggrieved party, if he wants to challenge an election, is by way of an election petition and the exclusion of all other remedies includes constitutional remedies like the one provided by Article 226 because of the non-obstante clause. The Court observed:

The paramount policy of the Constitution framers in declaring that no election shall be called in question except the way it is provided for in Article 329 (b) and the Representation of the People Act, 1951, compels us to read, as Fazal Ali J. did in Ponnuswami, the Constitution and the Act together as an integral scheme.

The Court also held that the compendious expression 'election' connotes the 'rain-bow' of operations commencing from the issue of the notification under Section 14 to the declaration of the result under Section 66 of the Act.

Two conclusions are clear: Firstly, the Election Commission being the 'reservoir' of power is competent in an appropriate case to order re-poll of an entire constituency whenever necessary. It will be an exercise of power within the ambit and scope of its functions under Article 324.

Secondly, as Krishna Iyer, J., noted, Article 329 (b) is a 'blanket ban' on litigative challenges to electoral steps.
taken by the Commission for carrying forward the process of election to its culmination in the formal declaration of the result. The sole idea is that elections should be concluded as early as possible according to time schedule and all controversial matters and disputes arising out of elections should be postponed until after the elections are over, so that the election proceedings may not be unduly retarded or protracted.

An important question is: Can the Commission in exercise of the powers available to it under Article 324 exercise powers of a legislative nature also apart from the power to frame rules wherever delegated to it by the Parliament? In A.C. JOSE V Sivan pillai\textsuperscript{52}, the Supreme Court was called upon to answer the question whether the Commission had the competence to introduce voting by electronic machines. In the Court's view any change in the existing mode of voting could be effected only through a law which the Parliament alone was competent to enact. The Court's observation was that Article 324 did authorise the Commission to exercise powers of superintendence, direction and control of the preparation of electoral rolls and the conduct of elections but then the Article has to be read harmoniously with the Articles that follow and the powers that are given to the Legislatures under entry 72 in the Union List and entry 37 of the State List.
of the Seventh Schedule to the Constitution. It further observed:

The Commission in the garb of passing orders for regulating the conduct of elections cannot take upon itself a purely legislative activity which has been reserved under the scheme of the Constitution only to Parliament and the State Legislatures... Merely being a creature of the Constitution will not give it plenary and absolute power to legislate as it likes without reference to the law enacted by the legislatures.

Murtaza Fazal Ali, J., speaking for the Court on behalf of himself, Varadarajan and Ranganath Misra J.J. summed up the legal and constitutional position of the Commission as follows:

(a) When there is no Parliamentary legislation or rules made under the said legislation, the Commission is free to pass any orders in respect of the conduct of elections,

(b) Where there is an Act and express Rules made thereunder, it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. In other words, the powers of the Commission are meant to supplement rather than supplant the law (both statutes and Rules) in the matter of superintendence, direction and control as provided by Article 324,
(c) Where the Act or the Rules are silent, the Commission has no doubt plenary powers under Article 324 to give any direction in respect of the conduct of election, and

(d) Where a particular direction by the Commission is submitted to the Government for approval, as required by the Rules it is not open to the Commission to go ahead with implementation of it at its own sweet will even if the approval of the Government is not given.

The conclusion of the Court, thus, was that Articles 324 to 328 relate to the manner in which elections are to be held, the rights of persons who are entitled to vote, preparation of electoral rolls, delimitation of constituencies, etc. But this is merely the storehouse of the powers and the actual exercise of these powers is left to Parliament under Articles 325 to 329. Article 324 has to be read in harmony with, and not in isolation of Articles 326 to 329.

On the facts of the case the Court's unanimous opinion was that the word 'ballot' in its strict sense would not include voting by the use of voting machines. The Act and the Rules completely excluded the mechanical process which, if resorted to, would defeat in a large measure the mandatory requirements of the Rules. Hence the
order of the Commission directing casting of ballot by machines in some of the polling stations was without jurisdiction and could not have been resorted to.

Two more verdicts of the Supreme Court which have amply demonstrated the width of the powers of the Election Commission require a mention here. The first one is Inderjit Barua V Election Commission\(^55\) in which the petitioners sought to challenge the election by a writ petition under Article 226 on the ground that the electoral rolls on the basis of which the impugned elections were held by the Commission to the Assam Assembly, were invalid. The petitioners sought to escape from the ban of Article 329 (b) by contending that they were challenging the impugned elections as a whole and not any individual election and that the ban of Article 329 (b) therefore did not stand in the way of the writ petitions filed by them. A five-judge bench of the Supreme Court rejected the contention and held that under the Act there was no concept of elections as a whole. "What that Act contemplates is election from each constituency and it is that election which is liable to be challenged by filing an election petition... Even where in form the challenge is to the elections as a whole, in effect and substance what is challenged is election from each
constituency and Article 329 (b) must therefore be held to be attracted.\textsuperscript{56}

The petitioner's contention was that the Court should direct the Election Commission to \textit{suo motu} carry out an inquiry for the purpose of determining whether any of the persons whose names were included in the electoral rolls of 1970 or earlier electoral rolls were citizens or not and if they were not found to be citizens their names should be deleted from the electoral rolls. The Supreme Court refused and held that it was entirely for the Commission to decide in the exercise of its discretion whether it should carry out any such revision \textit{suo motu} under Rule 25 of the Electoral Registration Rules, 1960. The Court also held it neither desirable nor proper to lay down as to what quantum of proof should be required for the purpose of substantiating any such claims or objections lodged before the Election Commission. It would be for appropriate electoral officer to consider and decide in the light of such material as may be produced before him by the objector as also by the person whose name is sought to be deleted from the electoral rolls.\textsuperscript{57} The Supreme Court also refused to issue any direction to the Commission not to hold any elections to Parliament from Assam until the revision of
electoral rolls is completed. On this proposition the court followed its earlier stand in Hassan Uzzaman\textsuperscript{58} where a Constitution Bench had observed:

...though the High Court did not lack the jurisdiction to entertain the writ petition and to issue appropriate directions therein, no High Court in the exercise of its powers under Article 226 of the Constitution should pass any order, interim or otherwise, which has the tendency or effect of postponing an election, which is reasonably imminent and in relation to which its writ jurisdiction is invoked.\textsuperscript{59}

The second case is Election of India V State of Haryana\textsuperscript{60}. The facts of the case were that a bye-election\textsuperscript{(60-a)} to an Assembly Constituency in Haryana was due. The Election Commission fixed the date of poll and informed the Chief Secretary of Haryana who was also the Chief Election Officer (CEO). The Commission fixed an identical programme for filling 23 other vacancies in the legislative Assemblies of A.P., Karnataka & West Bengal. The Commission received the reply from the Chief Secretary, conveying the request of the Government that the proposed bye-election should be held along with the general elections to the Lok Sabha, which were due later that year. The Commission informed the Chief Secretary that it had decided to adhere to the programme of bye-elections to 24 vacancies in their respective
jurisdiction. The message mentioned that the Commission had taken into consideration the replies received by it from various State Governments and their CEOS on the question of holding the elections.

The Chief Secretary wrote to the Commission that it would not be possible to hold the election during the proposed period because, the neighbouring State of Punjab was going through a serious problem of law and order, that there was a dispute regarding territorial adjustment and division of waters between the State of Haryana and Akali Party in Punjab and that there was serious threat to the lives of many important persons in Haryana. The Commission again replied that it had taken the decision to hold the bye-election after taking into consideration all factors and that the political parties who were duly informed of the proposed election programme had not opposed the holding of the bye-election programme at this point of time. On the same date that the Commission wrote the aforesaid letter, the Government of Haryana filed a writ petition in the High Court of Punjab and Haryana and obtained an ex parte order.

The Election Commission, too, rushed to the Supreme Court challenging the order of the High Court.
The High Court had held that the law and order situation in the State of the Punjab and Haryana was such as not to permit the holding of the poll.

The centre of the controversy before the Supreme Court was the question as to who, the Government of Haryana or the Election Commission, had the final say in the matter of deciding about the exact time when an election should be held.

The Supreme Court by a ratio of 4:1 was divided in its opinion. The majority view affirmed the Supreme Court stand taken in A.K.M. HASSAN UZZAMAN that the imminence of the electoral process is an important factor which must guide and govern the passing of orders in the exercise of the High Court's writ jurisdiction and that, the more imminent such process, the greater ought to be the reluctance of the High Court to take any step which will result in the postponement of the elections. Chandrachud, C.J., speaking for himself, Tulzapurkar, Pathak and Madon, J.J. observed that the Government of Haryana was undoubtedly in the best position to observe the situation of law and order in areas within its jurisdiction and under its control. "But the ultimate decision as to whether it is possible and expedient to hold the elections
at any given point of time must rest with the Election Commission. "It is not suggested", the Court further observed, "that the Election Commission can exercise its discretion in an arbitrary or *male* fide manner. Arbitrariness and *male* fides destroy the validity and efficacy of all orders passed by public authorities." "A sense of realism, objectivity and non-alignment must inform the decision of the Election Commission on that issue."}

The Court found that the correspondence between the Chief Secretary of Haryana and the Election Commission showed that the latter had taken all the relevant facts and circumstances into consideration while taking the decision to hold the bye-election to a constituency, and against this backdrop opined that the High Court should not have exercised its power to postpone the election.

Thakkar, J., delivered a note of dissent. The learned judge did not differ on the basic proposition that the courts should be reluctant to interfere with the Commission's programme. He tried to make a distinction between general elections and bye-elections. For a bye-election, the learned judge observed, "there can be no question of imminence" or "indefinite postponement of
election" which would stall the installation of a democratically elected government. On the issue of law and order situation in the State it was observed that "the Election Commission appeared to have been altogether oblivious to the dimension as regards the bona fide apprehension pertaining to the life and security of the National leaders who might address public meetings, the candidates, the officers engaged in the election work and the voters." Justice Thakkar supported the ex parte order of the High Court passed in favour of the State on its writ petition, staying the holding of by-election on the date determined by the Commission.

On the minority opinion a learned commentator says that "If the minority view is accepted, it would tantamount to saying that in deciding the election schedule, it is the satisfaction of the court and not that of the Commission that matters. In this respect, the majority view is more viable. By apportioning the respective responsibilities of the State, the Commission and the Court, it holds categorically that the eventual decision in the matter has to be that of the Commission." Review Mohinder Singh Gill and A.C. Jose the conclusions that emerge from the judgments are that the
Commission can legitimately exercise all powers necessary for the conduct of a free and fair poll. It cannot, however, exercise a power which by its very nature must be a preserve of the Parliament. This distinction is fine and what powers are outside the Commission's purview must remain a question of fact. This position defies a generalisation as there are not many cases fought in the courts.

Even in *Inderjit Barua* which involved serious allegations as to the inclusion of a large number of names of non-citizens in the electoral rolls in Assam and the question before the Supreme Court was whether or not to direct the Commission to carry out an enquiry *suo motu* in the matter, the Court declined to intervene. The reason for the refusal to intervene is to be found *inter alia* in the Court's reliance of its confidence in the Commission's institutional integrity and impartiality and its assumption that the Commission being a constitutional body should be left free to act within its jurisdictional spheres unhindered.

_Election Commission V State of Haryana_ is the first case which had involved a court litigation between a State as the complainant and the Election Commission as the respondent. The State of Haryana had taken the position
that primarily it was the state government to decide whether the law and order situation was congenial to holding a bye-election in a constituency and that the Commission's decision to fix a date for the election must be guided by the State government's decision. The government had put forward forceful arguments in justification of its stand. The Supreme Court, while admitting that the government was the best judge to determine primarily the question of time, upheld the position of the Commission saying that the ultimate decision whether it was in fact possible to hold the election must rest with the Election Commission. The judgment is debatable to the extent it gave primacy of place to the Election Commission rather than to the State government in a matter which did not concern the jurisdiction of the Commission as much as it concerned the government's prerogative to determine on facts the question of feasibility. Here the minority view expressed by justice Thakkar seems to carry weight. The learned judge disfavoured a situation where the Commission is conceded a power to have a conclusive word in the matter of law and order situation in the State. It is this reason that the learned judge favoured the ex parte order of the High Court passed in favour of the State on its writ petition.
But that the majority sided with the Commission may be explained by an equally weighty argument that a State government may have been persuaded by political consideration to postpone the election to buy time to make the election produce favourable results.

It would be fair to conclude that the Supreme Court has taken an sympathetic view of the Election Commission as the constitutional functionary and has done its possible best to widen the scope of its jurisdictional competency.

**WORKING OF THE MACHINERY: AN EVALUATION**

The sustenance of political institutions in this country depends very largely on the success of the electoral machinery and on the extent to which the elections conducted by it would evoke public confidence. The Election Commission which had been vested with the power of superintendence, direction and control of elections has conducted ten general elections and a score of bye-elections. The Commission, until the 1991 general elections, had acquired for itself a respectable status in the constitutional scheme of the governance of the country. Indeed, in matters that pertain to elections, the only authority with credibility, apart from the courts, to
has generated public confidence in the electoral process, and a faith in the people that the electoral process would bring a government of their choice and preference. People have accepted major changes of power because the Commission's integrity has hardly ever been a subject of controversy. The Comission as an institution has brought credit to our parliamentary democracy.

However, the way the Commission has functioned in the recent past, particularly on the occasion of the tenth general elections has evoked reactions which have left its institutional integrity greatly eroded. Very soon after the commencement of the electoral process of the tenth general elections, the Commission came to be heavily criticised. Almost all the major political parties criticised the Chief Election Commissioner (CEC), though each for different reasons and some even went to the extent of making out a case of impeachment against T.N. Seshan, the CEC. On the allegations of large scale electoral malpractices, the Commission decided to countermand the elections in five Lok Sabha and fifteen Assembly constituencies in Uttar Pradesh and Bihar by a seemingly long period of three weeks. The criticism mainly
centered round two issues: Firstly, whether the decision of the CEC to countermand a number of elections was a decision taken in haste and with the dubious objective of favouring some political party or parties. Secondly, whether the CEC was legally competent to follow the procedure he had followed in arriving at his decision. The issue thus involved both the propriety of the decision as also its legality. On the first issue, the basic allegations were that the countermanding of an election as permitted by Section 58-A of the Representation of the People Act is an extreme step which in the particular circumstances was hardly warranted. The core of the accusations was that the CEC instead of ordering a repoll in as many booths as he suspected of having been affected by the use of unfair means, opted for a longer process: countermanding out of his own preference without either waiting of on-the-spot reports of the electoral officers or in scant disregard of their reports. In some cases, the CEC did not wait for on-the-spot reports from the electoral officers and in others the reports depatched by the Returning Officers/Observers indicated malpractices in only some of the following booths, and as such necessitating a re-poll only in the affected booths. In Patna parliamentary constituency, for instance, the Central observer had reported to the Commission that
allegations about booth-capturing were received for 23 polling booths in the Patna constituency on the polling day. It also reported that there were reports of snatching of ballot-papers at six places and bomb explosions in three other places. The Bihar Chief Electoral Officer in his report talked about the incidents as the above, but stated that the polling was peaceful and went on uninterrupted at all places. He added that the trend of polling "does not indicate any booth capturing" at a large scale. The Central observers also noted that voting was about 50 to 65 percent. None of them thus reported any large scale incidents of violence or booth capturing. The Bihar Chief Secretary in a message to the Commission noted that no report was sought by the Commission from the State government before passing the countermanding order. As to other constituencies too where the elections were countermanded, the criticisms were based on similar fact-situations.

On the second issue indeed a corrolory of the first issue, the main allegations were that the correct procedure for the CEC would have been to act upon the reports of the Returning Officers/Observers. What other sources of information did the Commission have to rely
upon for a crucial decision? If the CEC's judgment was based on media reports or on the complaints of specific individuals or a specific political party, was it a violation of the procedure indicated in Section 58-A?

This brings us to the question whether the CEC's order of countermanding the elections was an error of judgment or a violation of a statutory mandate. The CEC's decisions must be seen against the political and social perspective in which the 1991 elections were to be conducted. It was a common allegation that large-scale transfers of officials had taken place. The ruling parties and groups had managed to get pliable officials posted in their constituencies. Almost every opposition party had filed complaints with the CEC against such transfers long before the elections. During the 1989 elections, the mass media had exposed the professionalisation of rigging and booth capturing as also the violence on a very large scale in some States, particularly in U.P. and Bihar which indeed are notorious for such incidents. The apprehensions that the 1991 elections may see violence, booth-capturing and other electoral malpractices even on a wider scale came to be almost true when the first phase of the elections started on May 20, 1991.
It is true, as the facts have established, that the CEC did not depend on the reports of the returning officers in case of Bihar and U.P. But it is also true, and it is a common belief indeed, that electoral malpractices cannot take place in a constituency without some kind of connivance, if not active encouragement, of the local bureaucracy. The CEC was aware of it and had on its records the complaints about mass transfers submitted by almost all the political parties. The CEC's defence was that the political parties and the local bureaucracy were actively involved in the pursuit of unfair practices; the situation was really bad in U.P. and Bihar while in other States the issues were marginal. In defence of its position, the CEC even openly observed that the "impartiality" of the polling staff, including some returning officers "left something to be desired".

Section 58-A is the law which authorises the Commission to countermand an election. It lays down that if at any election booth capturing has taken place, the returning officer shall forthwith report the matter to the Election Commission. The Election Commission shall, on the receipt of a report from the returning officer and after taking all material circumstances into account, either declare that the poll at that polling station be void,
appoint a day for taking fresh poll at that polling station; or if satisfied that in view of the large number of polling stations involved in booth capturing the result of the election is likely to be affected, or that booth capturing had affected counting of votes, countermand election in that constituency.

Section 58-A does not indicate the source, apart from a report from the returning officer on which the Commission may place its reliance for arriving at a judgment whether or not the circumstances actually warrant a countermanding of the entire election. At law, therefore, the CEC is competent to take a decision independently of any advice, and to that extent the CEC's decision would seem to be unimpeachable.

But then all said, the alternative available to order fresh poll in only such polling booths about which complaints of malpractices were received by the CEC would have been perhaps a better course to follow. The CEC may or may not have been partisan or politically motivated. What is apparent on the face of the situation is that it was certainly a case of over-reaction which was hardly justifiable on facts as disclosed. The well-known dictum that "Justice must not only be done but must be seen to
have been done" holds good here too. While the CEC's power to countermand an election cannot be questioned, the Commission ought to use it only if all other options under the law fall short of the objective. In no case should the decision appear hasty, partisan and harsh. The people too have a right to know the basis on which the CEC takes a decision which ultimately concerns them.

**CONCLUSION**

The above discussion leads to the conclusion that all this would call for a fresh look at the electoral machinery which is a *sine qua non* of a viable political system. Fairness in elections is the foundation of democracy, and this can be achieved only if the electoral mechanism, so fondly devised by the Constitution, is able to work independently of extraneous pressures.

The 1991 general elections have badly shaken the public confidence in the Commission's institutional integrity, which hitherto had been its prized possession. It is high time that a fresh look is given to its functioning and positive legal measures are taken not only to erase the bruises it has suffered but also to make it more efficacious a mechanism of regulation and control.
NOTES AND REFERENCES

MECHANISM FOR FREE AND FAIR ELECTIONS

2. Ibid
3. See, C.A.D. 905 (Vol. 8, 1949)
4. Id at 905 - 906.
6. Supra note 3 at 906.
7. Ibid.
8. Ibid.
9. Supra note 5 at 10.
10. Ibid.
11. Ibid.
12. Ibid.
15. Ibid.
16. Supra note 5 at 13.
17. Id at 14
18. Id at 13
19. Id at 15
20. Supra note 14 at 1745-55.
21. Id at 1755
22. Supra note 3 at 906.
23. Id at 906-07
24. Id at 907
25. Id at 917
26. Ibid.
31. Supra note 5 at 29.
32. Id at 30
34. Section 25, R.P. Act, 1951.
35. Supra note 30.
38. Section 21, Id
39. Section 22, Id
40. Supra note 30 at 22.
41. Section 26, R.P. Act, 1951.
42. Section 27, Id
43. Section 28, Id
44. Supra note 5 at 39.
46. Id at 851.
47. Id at 886.
48. Ibid.
49. Supra note 45 at 892.
50. Ibid.
51. Supra note 45 at 866.
52. AIR 1984 S.C. 921.
53. Id at 923.
54. Id at 927.
56. Id at 1913.
57. Id at 1915.
59. Id at 219.
60. AIR 1984 S.C. 1406.
60a. See Section 150 of the Act.
60b. Supra note 58
61. Supra note 61 at 1409.
62. Ibid.
64. Supra note 60 at 1412.
65. Ibid.
68. Former Prime Minister and Janta Dal Leade V.P. Singh threatened to revive proceeding of impeachment against the CEC in Parliament See The Hindustan Times. Novembe 18, 1991. It also been said that "in the light of his behaviour it would be necessary for the new Parliament not only to take appropriate action against the CEC but also to frame a code of conduct for the Commission itself so as to preclude the possibility of the CEC adopting arbitrary steps on Seshan's lines in the days ahead." See Mainstream 1 (June 15, 1991).
70. On December 29, 1994, T.N. Seshan threatened that he would not hold elections to the five States already announced by him unless the task of completing the scheme of issuing identity cards to all electors had been accomplished within the extended time schedule. This tatemert of the Chief Election Commissioner was sharply criticised from
all quarters. Election Commissioner U.S. Gill strongly felt that it was "not constitutional" for the Commission to make the 1-card as an essential condition for holding the polls for State legislatures or for Parliament in future. Expressing his disagreement with Seshan, Gill said it was better to hold an "Imperfect election" than not to hold them. He asked "by what whimsicality" could the EC now refuse to hold polls without 1-cards when Assembly polls were successfully held in a free and fair manner in November in four States, and in fact, ever since independence: The Hindustan Times, New Delhi, January 5, 1995.

However, the Supreme Court on 17 January, 1995 stayed Seshan's direction linking Photo-Identity cards issue with the forthcoming Assembly elections in Bihar and Orissa. The Court order said that "The Election Commission shall not withhold the elections to The Legislative Assemblies in Bihar and Orissa on the ground that the said Governments had failed to complete the process of issuance of identity cards by the deadline prescribed by the Commission. The Court, at the same time, made it clear that its order should not be misconstrued as if it has stayed the ongoing process of issuance of photo identity cards and hoped that the Bihar and Orissa Governments would not take undue advantage of the Court's order and continue their efforts to provide identity-cards to all eligible voters by September 30, 1995 so that the identity-cards can be used by the voters in the next Lok Sabha elections scheduled in June next year: The Hindustan Times, New Delhi, 23 January, 1995.