



ELECTION COMMISSION AS A 'WATCHDOG OF FREE AND FAIR ELECTION

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Abstract

The constitution has declared India as a 'Democracy where only citizen can elect the government. Democracy will be futile without active participation of its citizens. Free and Fair elections are the chief essence of democracy. However election could be very notorious as it witness power drifts and clashed for the seat which could kill the essence of the fairness and freeness of election therefore an watch dog is required to check this menace so that every citizen could get its right.

Thus to ensure a free and fair election, an autonomous body was created to meet the need of time. This is a body autonomous in character and insulated from political pressures and executive influence. However organizing election is not easy, it faces huge challenges.

Targeting the aforesaid situation the research has been made on doctrinal model of research relying on secondary sources. It aims to determine the role of election in democracy and the structure of election commission and its constitutionality. It further determines the problem election commission face and constitutional validity of the remedies it takes. Thus research determines how election commission is a guardian to free and fair election in India.

INTRODUCTION

*Democracy cannot succeed unless those who express their choice are prepared to choose wisely. The real safeguard of democracy, therefore, is education.
Franklin D. Roosevelt*

Democracy is a "GOVERNMENT OF THE PEOPLE "BY THE PEOPLE AND FOR THE PEOPLE". Democracy can only works when all its citizen take active part in the selection of the governments. This had been the prime dream of the framers of the constitution whom realized that the fate of nation will only thrive when the people will choose their rules according to the will. Elections are key way for citizens in a democracy to communicate with representatives. Different rules about elections and concentration of assembly power can create either majoritarian or proportional systems of democracy. They realized that giving of power in a single hand for a long time will result in a dictatorial system that was the reason that several attempt were made by them in so that free and fair election could take place in the country. It was held that "One of the most important features of the democratic polity is elections at regular intervals. Elections constitute the signpost of the democracy; these are medium through which the attitudes, values and beliefs of the people towards their political environment are reflected. Elections are the central democratic procedure for selecting and controlling leaders. Elections grant people a government and the government has constitutional right to govern those who elect it. Elections symbolize the sovereignty of the people and provide legitimacy to the authority of the government. Thus, free & fair



*elections are indispensable for the success of the democracy*¹.

Thus in order to ensure free & fair elections the Constitution establishes the Election Commission. In 1950, the Election Commission has established in India. This is a body autonomous in character and insulated from political pressures and executive influence. Care has been taken to ensure that the Election Commission work as an independent body free from external pressures from the party in power or executive of the day². It is duty of the Election Commission to carry free & fair elections to the various legislative bodies in the country and guarantee the growth of democracy. There are mixed populated states. There are native people as well as others who are racially, linguistically and culturally different but to supervise, organize and conduct election the Commission is setup for All – India Level³.

Election and democracy

Elections and democracy are like two wheels of a chariot. If one removes a wheel the whole vehicle would be rendered immobile. Elections are a kind of political necessity which forms the heart of Indian Democratic order. A Democratic rule cannot be imagined without free and fair elections. Elections provide legitimacy to a person representing a particular area of population. In countries with biased election process, political

leadership lacks legitimacy; it would be a source of instability in political order and ultimately leads to turmoil⁴

India being an Electoral Democracy is "a system for arriving at political decisions in which individuals acquire power by a competitive struggle for the people's vote", or more simply, "a regime in which governmental offices are filled as a consequence of contested elections"⁵. Basically an electoral democracy is one in which the representatives of people are elected by the process of elections. Electoral Democracy should be Liberal Democracy. For it to be a Liberal democracy, in which all including the poor and ethnic and regional minorities are able to effectively compete in elections with non-trivial chances of getting elected, following conditions are to be met. These conditions are: the rule of law, an independent judiciary, constitutional constraints on executive power, strong fundamental freedoms entrenched as basic rights, including equality before the law, and freedoms of belief, faith, assembly, movement, residence, association, occupation, speech, publication, opinion, demonstration and petition, and including rights for religious, racial, ethnic, linguistic, cultural and other minorities, and civic pluralism including the presence of independent media⁶. Without these enabling conditions, legal and social, in place, elections can be manipulated⁷. Free and fair

¹ Indira Nehru Gandhi V/s. Raj Narayan

² indian Constitutional Law" target=_blank>Constitutional Law, Prof. M. P. Jain, 5th Edition, 2009, Pg. 806

³ <http://legalservicesindia.com/article/article/role-of-election-commission-108-1.html>

⁴ See Elections and Democracy by Ronald Meinardus

⁵ See Joseph A. Schumpeter, *Capitalism, Socialism and Democracy*, New York: Harper, 1947; Adam

Przeworski, Michael Alvarez, Jose Cheibub and Fernando Limongi, "What Makes Democracy Endure?",

Journal of Democracy, 7, No. 1 (1996)

⁶ See Larry Diamond, *Developing Democracy: Toward Consolidation*, Baltimore: Johns Hopkins University Press, 1999, pp. 8-13.

⁷ See GLOBAL DIMENSIONS OF ELECTORAL DEMOCRACY



elections are the part of democratic structure.⁸ All the seven Judges in the Fundamental Right Case⁹ agreed that democratic set up was part of the basic structure of the Constitution. Democracy postulates that there should be periodical elections, so that people may be in a position either to re-elect the old representatives or, if they so choose, to change the representatives and elect in their place other representatives, it further contemplates that the elections should be free and fair, so that the voters may be in a position to vote for candidates of their choice¹⁰. Democracy can indeed function only upon the faith that elections are free and fair and not rigged and manipulated, that they are effective instruments of ascertaining popular will both in reality and form and are not mere rituals calculated to generate illusion of deference to mass opinion¹¹.

Election supports the idea of Constitutionalism. Constitutionalism is the concept of *limited government*¹². The most important function of a written constitution is that of, controlling the organs of Government.¹³ Constitutionalism is the idea that the government should be legally limited in its powers, and that its authority depends on its observing these limitations¹⁴. According F.A.Hayek “constitutionalism means that all power rests on the

understanding that it will be exercised according to commonly accepted principles, that the persons on whom power is conferred are selected because it is thought that they are most likely to do what is right, not in order that whatever they do should be right. It rests, in the last resort, on the understanding that power is ultimately not a physical fact but a state of opinion which makes people obey”¹⁵ Constitutionalism is antithetic to arbitrariness¹⁶ and if there are prejudice and unfair elections then the governments formed by such elections would exercise arbitrary powers, which would be against the concept of constitutionalism. The basic difference between the ‘Constitutionalism’ and ‘Constitution’ is that, Constitution ought not merely to confer power on the various organ of the government but also seeks to restrain those powers, which is called Constitutionalism¹⁷. Fundamental Rights are an important principle for promotion of the principle of Constitutionalism¹⁸. The people delegated their powers and freedoms to the legislative, executive and judicial organs of the State while reserving some powers and freedoms to themselves, the fundamental rights which they made paramount by providing that the State shall not make any law which takes away or abridges the rights

⁸ See Smt. Indira Nehru Gandhi v. Shri Raj Narain And Anr., AIR1975 SC 2299

⁹ See Kesvananda Bharti v. State of Kerela, AIR 1973 SC 1461

¹⁰ *Ibid*

¹¹ *Ibid*

¹² See Russell Hardin, “Constitutionalism”. (Barry R. Weingest and Donald A. Wittman, “The Oxford Handbook of Political Economy”, Oxford University Press, London, p. 289.)

¹³ See Meaning of western constitutionalism, by Prof. Faizan Mustafa reading material first edition

¹⁴ *Ibid*

¹⁵ See F. Hayek, the constitution of liberty, Chicago: university Press, 1960 pg. 181

¹⁶ See Giovanni Sartori, “Constitutionalism: A Preliminary Discussion”, (1962) 56 Am. Pol. SC Rev. 853.

¹⁷ See M. P. Jain, Indian Constitutional Law, 5th edition, rep. 2006, Wadhwa Publications, Nagpur, pg. 6.

¹⁸ See M. P. Jain, Indian Constitutional Law, 5th edition, rep. 2006, Wadhwa Publications, Nagpur, pg. 6.



conferred by that Part¹⁹. Like Fundamental rights, elections also form a tool of limiting the power of the executive and legislature. Constitution of India provides for regular elections for Parliament and State Assemblies, and Election Commission are set up for the superintendence, direction, and control of election. When you are having the limitation on time period to control over the nation, you are basically trying to curb down the power of the governance, which the Constitution has limited to five years for a government, before holding the next elections²⁰. Thus in this manner we are able exercise control over the government automatically with the help of Constitution; so also for further check and control on the government, we have Judiciary. Judiciary looks down into the control of the ruling party over the nation and holds it down if needed.

Constitutional Standing of Election Commission

Democracy shall only sustain by free and fair elections.²¹ Only free and fair elections to the various legislative bodies in the countries can guarantee the growth of democratic polity. India is characterized by the largest democracy of the world²². At a general elections millions of people are going to the polling booth for the selection of the policy makers who can curve the fate of their sustainable future of India. The preamble of the Indian constitution declares India as a Democratic Republic thereby free and fair

election is the biggest requirement of the nation. Free and fair election has been held as the basic structure of the constitution of the nation²³

Thereby in order to have a free and fair elections the framers of the constitution created an impartial body which has a sole purpose of conduction free and fair elections in the country.²⁴The constitution established an autonomous body character and insulated from the political pressure or of the executives influence. All reasonable care were taken in creating this body as an independent agency whicg shall be free from all pressures of political party in power and the executives of the day²⁵.

The importance of Election Commission can be observed from the fact that it is placed in a separate part i.e. Part XV of the Constitution of India, after the Union and the State which shows that election commission works as an independent body irrespective of the federal set up. Part XV of the Constitution is really a code for itself providing the entire ground work for enacting appropriate laws and setting up machinery for the conduct of elections²⁶. The Committee of the Constituent Assembly on fundamental rights had recommended that the independence of election should be regarded as a fundamental right of every citizen²⁷. The Assembly agreed with the view if the Committee that the question of fair election was a matter of great importance but it was not in favor of

¹⁹ See A.K.Gopalan v. The State of Madras, AIR 1950 SC 27, H. M. Seervai, "Constitutional Law of India: A Critical Commentry", vol. 1, 4th Edi., Universal Law Publishing Co. Pvt. Ltd., Delhi, p. 369, para 7.40.

²⁰ See The Constitution of India, Article 81, 117

²¹ S.R. Bansali "The constitution of India" India publication house, ed 1, Volume 2 pg 10708

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²³ Keshavand bharti v union of india

²⁴ J.N pandey

²⁵ Mp Jain

²⁶ See N.P.Ponnuswami v. Returning Officer, AIR 1952 SC 64

²⁷ See V.N.Shukla, Constitution of India, 11th edition, rep. 2008, Eastern Book Company.



embodying a right to that effect in the chapter on the fundamental rights²⁸. In pursuance of the decision of the Assembly, the Drafting Committee removed the matter from the category of fundamental rights and put it into a separate part, which finally became Part XV of the Constitution²⁹.

The commission was vested with all the powers where elections were concerned. The commission was set up under Art 324 (1). It had been an all India body having a jurisdiction over the election of Lok Sabha Rajya Sabha, State legislatures, Office of president and vice president.³⁰ The reason for having an all India body for the supervise and conduct elections. Rather than the separate body to organize elections of the states. The entire election machinery of state and central has thus been placed under the hand of centralized body which alone is entitle to issue the directions and frames the policies of the conducting a free and fair election in the country. The election Commission shall be independent of executive control inasmuch as the members of the election commission shall not be removed by the president except in recommendation of the election commissioner³¹

The word “supritendence directions and control empowers the election commission to act in contingencies not provided for by law³² and to pass the orders for conduct of election. It has to direct special revision of the electrol role for any constituency. The word

superintendence, directions and control are enough to include all the powers which are required to conduct smooth election so that will of the people could be expressed³³ It had been held that “The Constitution has taken care of leaving the resudary power by the commission in its own right as a creature of the constitution in the infinite variety of the situation that may emerge from time to time in the large democracy as every contingency could not be foreseen or anticipated by laws, and commission can fulfil such vacuum created³⁴ The courts have also heled that the power exercise by the commission shall not be exercised mindlessly nor mala fide nor arbitrarily nor partially but keeping in the guideline of the rule of law and not stultifying the presidential notification nor exercising legislations³⁵

Election commission is primarily an administrative body but also exercise certain adjudicatory function also. It has a power Under Art 324 dealing with the relevant provisions of Election symbols, aducicate dispute regarding the recognition of the political parties or rival claims to apurticular symbols for the purpose of election³⁶. In such case the commission is empowered to act as a judicial body when such disputes arises³⁷

Parliament is empowered to make laws but it is the sole duty of the commission to conduct those elections. And even as a matter of law plenary power cannot be taken away by the parliament of the commission by even laws

²⁸ *Ibid*

²⁹ *Ibid*

³⁰ Dr Ambedhkar Speech VII CAD 905-7

³¹ Dd basu pg 10809

³² Kanhiya V trivadi AIR 1986 SC 111

³³ Election Commisioner of Inda v Ashok Kumar Air 2000 Sc 2979

³⁴ Union of India v Association for the democratic Reform AIR 2002 SC 2112

³⁵ Digvijay Mote v Union of India 1993 Scc 3127

³⁶ Yusuf Salim V shiv Kumar Air 1974 SC 1218

³⁷ Shillong v Sangama AIR 1977 SC 2155



framed by the parliament ³⁸, if parliament makes any law which is of such contravention in nature then it would be repugnant to Art 324. It shall be noted that fixing the dates of election either to the house of the people or the legislative assembly is the exclusive domain of the election commission especially when power is not subject to any law made by parliament.³⁹

Under 324 the commission has the power to issue the directions requiring the political parties to submit to the election commission for the scrutiny of details of expenditure incurred by them or their authorized agent by parties in connection with the election of their candidates. It shall be noted that constitution has prepared itself to face any surprise problem and operate well in areas unoccupied by legislation. It was held by court the purity of election is fundamental to democracy and thereby the election commission has full authority to question about the expenditure done by the parties to curb the money power ⁴⁰

This empowerment to the powers of commission has resulted in the new controversy where right to privacy was hunting its existence for the candidates contesting election however courts came to the rescue and state that it's the right of every citizen under Art 19 (1)(a) for every citizen to know about the people for whom they are voting to. The supreme court said that Election Commission can issue direction calling for the information from the candidates ⁴¹

The election commission can order re poll for the whole constituency if it deems fit in the bona fide spirit that the purpose of election has not been achieved. It was held that this Article has to be read in the light of the constitution scheme and the Representation of the peoples act of 1950 and 1951. It was observed that the Art 324 its wide enough to supplement the power under the Acts. But before directing re poll principles of natural justice must be followed ⁴².

No court would extend its jurisdiction in issuing the direction to the election commission for the conduct of the particular polls on particular dates of independently of the perception of the commission as to their feasibility and practicability consistent with what may be needed to ensure purity of the electoral process.

Jurisdiction of courts

The election commission is the tribunal within the meaning of Art 136 (1) inasmuch as the commission has been created by the constitution and vested with the power some of which are adjudicatory. Hence order of the commission are subject to appeal by S.L.P of supreme court by Art 136.. An order of commission can be challenged under Art 32 if it include question of constitution validity. It could also be challenged on the ground of ultra vires in election petition before the high court under s 116A of Representation of People Act 1951 ⁴³. There were that consent were laid in absence of any period of

³⁸ DD Basu pg 10711

³⁹ Special Reference No 1 of 2000

⁴⁰ Union of India v Ass for democracy reform AIR 2002 SC 2112

⁴¹ A registered society v union of Inda AIR 1996 SC 3081

⁴² Mohinder Singh Gill v CEC Air 1978 SC 851

⁴³ Election commission v state of Haryana AIR 1984 Sc 1406



limitation for holding election in the said constituency in Constitution or in R.P Act and giving powers to the commission in this context will be end of the democracy however Supreme court held that it would be doing each and every thing in protecting the democracy which is the basic structure of the constitution ⁴⁴.

Structure of the Commission

Elections are an important part of democratic government⁴⁵. Elections and democracy are like two wheels of a chariot. If one removes a wheel the whole vehicle would be rendered immobile. Elections are a kind of political necessity which forms the heart of Indian Democratic order⁴⁶ Thus, to make sure that elections are free and fair, the Constitution of India (Article 324) provides for an Election Commission.

It consists of a Chief Election Commissioner and some other members (at present, there are two other members). They are appointed by the President of India. Their terms and conditions of service are determined by the Parliament. The normal tenure of the Election Commissioners is 6 years. However, they can be removed from office by the same procedure by which a judge of the Supreme Court can be removed.

The commission consists of a Chief Election Commissioner and other Election Commissioners, appointed by the president and may fix the number as per the time by Art 321 (2).⁴⁷ The Chief Election commissioner act as a chairman of the commission of any

other Election commissioner has been appointed by the president. It shall be clear that the appointment is not given extremely in hand of central executive however prescribe that president shall consider with the CEC for appointment of the EC ⁴⁸. The regional commissioners are appointed by the president in consensus with the CEC as per requirement of the state and the constituencies.

An Obligation was been made on the state and central government that at time of requirement of the state or election commission the government has to arrange the employees for the commission for smooth functioning of the commission. By Art 324 (p)⁴⁹ However the staff so mentioned here includes only those who come under the disciplinary control of the government. It means that an employee of statutory body cannot be asked to be placed for election purposes⁵⁰

The Constitution does not prescribe any qualifications, academic or otherwise, for appointment to these offices. However, by convention, only senior civil servants, either serving or retired, of the rank of the cabinet secretary or secretary to the Government of India or of an equivalent rank have been appointed as the Chief Election Commissioner and election commissioners so far. In *Bhagwati Prashad Dixit Ghorewala v. Rajiv Gandhi*⁵¹[6], it was contended that as the Chief Election Commissioner is placed at par with a judge of the Supreme Court in the

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⁴⁵ Srivastava

⁴⁶ Akash Johri

⁴⁷ M.P. Jain

⁴⁸ *ibid*

⁴⁹ *CEC v State of West Bengal* 1961 SCC 342

⁵⁰ *Election Commission v State Bank of India* AIR 1995 SC 1078

⁵¹ *V S Rama Devi and S K Mendiratta*, Election laws, Practice and Procedure, (Nagpur: Lexis Nexis Butterworths) 2006 P 187.



matter of his removability from office under the Constitution, for his appointment also he should possess qualifications similar to that of a judge of the Supreme Court. However, the Supreme Court rejected that contention.

The Chief Election Commissioner may be removed from his office in like manner and on the like grounds as a judge of the Supreme Court. It means the Chief Election Commissioner may be removed from office by Parliament by passing a resolution to that effect, passed by special majority on the ground of proved misbehavior or incapacity. The Election Commission shall consist of a chief Election Commissioner and such other Commissioners as the President may, from time to time, fix. Other Election Commissioner may be removed by the President on the recommendation of the Chief Election Commissioner. Salary of chief election commissioner is same as justice of Supreme Court of India. All three commissioners have same right of taking a decision. Tenure of commissioners is 5 years or up to age of 65, whichever is earlier. The Election Commission of India has completed more than 300 elections. The Chief Election Commissioner can be removed from office only on the like manner and on like grounds as a judge of Supreme Court⁵².

Until October 1989, there was just one Chief Election Commissioner⁵³. In 1989 the central government changed the structure and appointed two other commissioners by Art 321(2). The underlying purpose of the move seems to be to curb the ultimate power of the CEC who single handedly exercise the power.

In 1989, two Election Commissioners were appointed, but were removed again in January 1990. In 1991, however, the Parliament of India passed a law providing for the appointment of two Election Commissioners. This law was amended and renamed in 1993 as the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Amendment Act 1993. As of Tuesday, 21 April 2009, the CEC is Navin Chawla. The two Election Commissioners are S.Y. Quraishi and former Power Secretary V.S. Sampath . The Apex Court held that “ *when an institution like the election commission is entrusted with vital function an is armed with exclusive and uncontrolled power to exercise them. It is both necessary and desirable that such power shall not be enjoyed by one individual however wise it may be* ⁵⁴ thereby the court held that the 1980 notifications are valid Art 324 (2) leaves to appoint the such number and appoint the election commissioner as he may in time determine. *The power to create a post is unfettered so is the power to reduce or abolish them* “

In 1993 the central government decided to convert the commission into a multi member body. According to the two notifications were issued 1/10/93. According to the one EC was fixed at two. According to the second the remaining were appointed as two. Thereby the T. N. Seshan challenged the notification and the two appointments mentioned in the act of 1993. In T. N. Sheshan v Union of India ⁵⁵the supreme court rejected the argument and upheld the appointment of E.C as well as the provisions of the act . By

⁵² ibid

⁵³ Legal India,
<http://legalservicesindia.com/article/article/election-commission-of-india-246-1.html>

⁵⁴ S.S Dhanoo v Union of India AIR 1991 SC 1745

⁵⁵ (1995) 4 SCC 611



further order dated 15 December 1993, the matter was referred to a Constitution Bench, as it involved interpretation of art 324. The Constitution Bench of the Supreme Court (AM Ahmadi CJI, JS Verma, NP Singh, SP Bharucha and MK Mukherjee however, dismissed all the above petitions by a unanimous decision⁵⁶ on July 14 1995, disagreeing with some of the observations of the division bench in Dhanoa's case⁵⁷.

The Supreme Court, dismissing the above petitions, held that the scheme of art 324 is that the Election Commission can either be a single member body or a multi—member body, if the President considers it necessary to appoint one or more election commissioners. The argument that a multi-member Election Commission would be unworkable and should not, therefore, be appointed could not be accepted as that would tantamount to destroying or nullifying ell (2) and (3) of art 324. By aft 324(1), the Constitution makers entrusted the task of conducting elections in the country to the Election Commission and not to an individual. The Commission discharges a public function.

The election commissioners form part of the Commission and, therefore, they must have a say in decision making. If the Chief Election Commissioner is considered to be superior in the sense that his word is final, he would render the election commissioners non—functional or ornamental. Such an intention is difficult to cull out from art 324 and it is not possible to accept the argument that the function of the election commissioners is only to tender advice to the Chief Election

Commissioner. The Chief Election Commissioner does not enjoy a status superior to election commissioners, only because the first proviso to cl (5) of Art 324 lays down that conditions of service of the Chief Election Commissioner cannot be varied to his disadvantage after his appointment and because such protection is not extended to the election commissioners.

Thus now Election Commission is now a multi member body havin one ECE and two CE. It is now assumed that multi member CEC is order of the day and their appointment and removal has been that of the judge of supreme court. However the order made by the court was well explained that “*only because the procedure and ground of CEC are same of a supreme court Judge they cannot be assumed the said status*”⁵⁸.

OBSTACTCLES FACED BY ELECTION COMMISSION

A Democratic rule cannot be imagined without free and fair elections. Elections provide legitimacy to a person representing a particular area of population. In countries with biased election process, political leadership lacks legitimacy; it would be a source of instability in political order and ultimately leads to turmoil⁵⁹. Elections are of vital importance in representative democracy whose process should recognize the people's will and sovereignty. It is on this premise that the Election Commission was established under Article 324 of the Constitution of the of India , and mandated to organize, conduct and supervise regular, free and fair elections

⁵⁶ Ibid

⁵⁷ ibid

⁵⁸ Supra 36

⁵⁹ See Elections and Democracy by Ronald Meinardus



James Nits in his book, "Management Dimension of Free and Fair Elections" shades more light on what constitutes a free and fair election: *"to determine whether an election has been free and fair, the election must be conducted under conditions that enable the voter to cast his or her vote as he or she wishes purely on his or her own accord. The conditions must be such as the voter is able to cast his or her vote for whoever candidate he or she wishes to vote for. There must be no obstruction, harassment, hindrance, threats or intimidation. There must be no bribery to induce the voter to vote in one way or another. There must be no conditions creating fear in the minds of the voters for prosecution or victimization after the elections have taken place"*⁶⁰.

It shall also be observed that to conducting free and fair election is a matter of several obstacle depending of the nature of are concerned and the commission faces several problems in the conducting of the election. S.Y Qurasi (the CEC) said that *" Conducting election depend upon the nature of the society of the area and the social forces acting in those constituencies. To conduct the election in a rural area of bihar or underdeveloped area of Jharkhand require huge awareness whereas conducting election in area of terror require physical security of the voter"*⁶¹. Thus the problem faced by the commission is very area specific and requires huge efforts by the commission as well as support of the government

All aspects in the electoral process have to receive due attention from all stakeholders,

as this will enlist the spirit of fairness in the running of electoral activities. The electoral process itself must, in its design and implementation, reflect best practice principles, which are accepted by all the relevant stakeholder engaged in the electoral process. The definition thereof however, varies from country to country, although the basic concerns for the management, conduct and supervision can be developed by individual countries.

In the execution of its functions, the Commission has been faced with the following challenges:- late enactment of laws, qualification of candidates, campaigns characterized by election violence, voter fatigue, putting in place a credible voters' register, to mention, but a few.

Qualification of Candidates and Voters

The issue of equivalence to determine a candidate's qualification is still susceptible to misinterpretation coupled with the problem of forgery by some persons in order to qualify. The electoral laws pertaining to eligibility of voters and candidates for particular elections are paramount. These have to be communicated to the voters and candidates in order not to create mishaps over which group of persons are being favored for whichever elections. Requirements for candidates to contest during elections for some offices have frequently raised concern from opponents – leading to court cases. A few by-elections have already been conducted as a result of this. It is the prime duty of election commission to check that whether a contesting person is eligible for

⁶⁰ James Nits in his book, "Management Dimension of Free and Fair Elections

⁶¹ toi



contesting the election or not. All rights in concern of elections have been given to the member In case of **Kapil Muni Karwariya vs Chandra Narain Tripathi**⁶² it was held that “ *the question to determine that whether an appeal is maintainable before the court on election commission in case of rejection of a candidate for contesting election depend upon the eligibility of the candidate to contest the election. The tribunal can reject any person if the person does not fulfill the requirement to contest the said election*”. Thus onus to verify the eligibility lie with the commission. In case of **Birad Mal Singhvi vs Anand Purohit**⁶³ it was held that “ *candidate who is below the eligible is can be disqualified by the election commission as he was not fulfilling the eligibility of age* “

Election Violence

The Electoral Commission draws guidelines for campaigns for candidates. These guidelines are derived from provisions of the laws governing the conduct of elections during campaigns. The Commission does this in anticipation that candidates shall be free to expound on their programs and campaign manifestos in an orderly manner. Likewise, the behavior of voters/supporters of candidates should demonstrate restraint from intimidation and violence.

However the phenomenon of violence is taking root and is becoming a serious challenge in our electoral process. Some candidates now use it as a method of campaign causing fear and intimidation among the electorates. The causes are rivalry

among candidates, ignorance and lack of democratic culture, monetization elections and bribing of voters, partisan politics and campaigns, greed for power coupled with fear to lose elections on polling day, weak electoral laws to effectively curb violence and affinity to rig.

THE six-phase, 19-day panchayat elections held in caste-ridden Bihar in April were swathed in blood. At least 100 people were killed and thousands injured in the turf war between the old masters from the upper castes and the newly empowered Dalits. There were 1,30,563 candidates for mukhia (panchayat head), 2,28,995 for seats in the panchayat committee and over four lakhs for membership in the district councils. The elections, in 8,452 panchayats in 29 districts, were held after 3 years⁶⁴. Thereby such trouble are resolved by the election commission. The similar line of problems were face many times in Jammu and Kashmir and now in the naxal areas⁶⁵

1.3(d) Voter Fatigue

It has been noted that frequent elections may be good for the people to choose representatives but it also causes voter fatigue thereby furthering voter apathy. The challenge thereby is what should be done with the population to ensure that they sustain consistent participation in the electoral process. The possibility of combining elections which do not have many variations like the Presidential and Parliamentary elections (with the exception of election for Special Interest Groups to Parliament) could be explored. It's a duty of parliament to decide the time for conducting

⁶² CIVIL APPEAL NO.2122 OF 2012(Arising out of SLP(C)No.16734 of 2011)

⁶³ AIR 1796, 1988 SCR Supl. (2) 1

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<http://www.frontlineonnet.com/fl1810/18100380.htm>

⁶⁵ ibid



election however the actual problem face by the commission is that the often election lead to fatigue in voters . The national statical bureu shows that there had been a decline of 8 % voting in general election in 1998 general election in urban areas ⁶⁶ Thus it is one of the prime difficulties faced by the voter to recreated the interest by massive awareness.

Putting in Place a Credible Voters' Register

Availability of a credible Register on polling day before casting a vote underscores the significance of the register in elections. Thus, the following activities that have to be carried out prior to production of the polling day register should be given special attention:

- (i) Registration of eligible voters
- (ii) Compilation/processing of the register,
- (iii) Display of the register
- (iv) Production/availability of the polling-day register

Consequently the Electoral Commission, under the Photographic Voter Registration Identification System (PVRIS) Project, carried out fresh registration of voters nationwide in a bid to improve the quality of the old register by adding pictures of the voters biodata as well in the register database.

Already about 8.2 Million voters are registered under the project and close to 2 Million voter cards bearing photographs have been produced. Similarly several elections and by-elections have been conducted using the photo bearing registers.

Voters' Register.

Independent Election Monitoring and observing of elections by the Commission is a challenge in that most often a time, it becomes expensive to involve Commission staff to overseeing or presiding over some of the electoral process. However, with resources available, this is important because it ensures transparency in the electoral process. While the supervision of elections is primarily the responsibility of the Commission, due credence is attached to ratification of the entire process by independent observers. Thus, the scope of monitoring or observing the electoral process should transcend both preparatory and polling day activities of an election by not restricting it to polling day activities alone.

1.3(I) Inadequate Training

In line with the foregoing, and in relation to our election officials, adherence to voting procedures and regulations is as important as material preparation for elections. Well-trained personnel at all levels of the electoral structure contribute significantly to the conduct of elections and in keeping with accepted international standards for open and transparent participatory elections.

Verbatim reading of the electoral laws does not constitute training. To be effective, a training program should be participatory. Trainees need to leave the training with some kind of memory aid, copies of legal documents governing the elections, regulations, guidelines, related posters/pictorial demonstrations or election

⁶⁶ source



officials manual to be the best option and serves as a reference document for trainers and practitioners.

There is need for election officials, especially the core group of trainers to be experienced and mature persons of good character and integrity, for example professionals, Head-teachers, magistrates and bureaucrats. In Eritrea and Ghana, for example, retired professionals are recruited as election officials.

Training should not be considered a luxury but an integral part of election preparation and this can only be achieved if there is adequate funding. The Commission is also called upon to fill up existing vacancies in its structure so as to have an efficient human resource to competently handle its programs.

Election Commission the watch dog of free and fair election

Election commission is one of those constitutional body which is not only vested with the duty of conducting election but serves a very important purpose of conducting a free and fair election. *It is the right to be governed by good legislature which is consequently made by good legislators.*” Legislators are elected through the process of election. Elections help us to know the real representative of the citizen. Now a day’s election in India is known for its muscle and money power on one hand and use of caste and religious sentiments of electorates on the other hand. Government today is not taking the necessary step to curtail due to political pressure, in spite of

commissions, committee reports and judicial interferences. Therefore there is an urgent need for strengthening election commission and subsequent judicial intervention, which is required for the better administration of elections. The concerned paper would be analysing that how within the contours of constitution electoral reforms can be made. Thereby election commission itself take several measures to restrict the misuse of power during election period.

The following are few steps taken by the commission in controlling the function of biased elections .

1. Choice of symbols by candidates:- a controversy put aside

It has been a prime function of election commission to a lot symbols to the parties. The chief purpose of this is to achieve the proper voting by even those who are not able to read or write.

In the case of Samyukta Socialist Party vs Election Commission Of India & Anr on 30 September, 1966⁶⁷ Rule 5(1) The Election Commission shall, by notification in the Gazette of India and in the Official Gazette of each State, publish a list of symbols and may in like manner amend such list."

Under the power conferred under the existing Rule 5(1) the Election Commission has prepared a list of free and reserved symbols and has notified them from time to time together with the restrictions to which their use is subject. The reserved symbol is indicated in the various notifications either

⁶⁷ 1967 SCR (1) 643



by putting it against the name of the particular Political Party or by showing the name of the Political Party in brackets opposite it.

It is said that by changing rule 5(1) and dropping the last 8: words from that rule the Election Commission has denied to itself the power to amend the list of symbols. This is not correct.. Before a candidate can choose a symbol it must be free. Before a reserved symbol can be chosen the candidate must be accredited to the party whose symbol it is and it must be shown by the Election Commission in its, notification as the symbol of that party. Obviously, therefore, if circumstances change the notification must follow suit. Parties may come into existence and parties may go out of existence; parties may unite or parties may separate. This will require amendment of the notification. Just as the Election Commission allotted the 'Hut' as a symbol by a change of notification to the Samyukta Socialist Party, it can allot it to another party if circumstances made that course obligatory and just. In *Sadiq Ali vs. Election Commissioner*⁶⁸ the Supreme Court upheld the validity of the order which was passed under Symbols Order, 1968. Rule 5(1) of the rules made by the Central government under the representation of the People Act, 1951 empowers the election commission to specify the symbols which candidates for election may specify. The Election Commission has issued the Symbols order, 1968 under Article 324 read with these rules. The validity of this order has been challenged from time to time on the ground that the order being legislative in character is ultra vires the commission because the commission has

executive, but not legislative power under Article 324.

2. Criminalization of Politics

Even after the 60's years of India's sovereignty, the blessings of independence have reached only to the creamy layer of the society, thus creating India the island of few ultra rich people encircled by vast sea of entirely poor. The criminalization of politics has spread its roots from legislature to executive and from executive to judiciary. In Indian parliament, around 20% of the members of the current Lok Sabha have criminal cases pending against them. The charges of these cases are of very serious crimes like rape, kidnapping, murder, robbery etc⁶⁹.

Election Commission of India has recently in May 2009, conducted general elections for 15th Lok Sabha at 543 constituencies all over India. Let us have a look at the status of criminalization data in Indian politics.

	2004	2009	Increase	% Increase
MPs with criminal records	128	150	22	17.2%
Total Criminal cases on MPs	429	412	-17	-4%
MPs with serious criminal records	72	17	55	30.9%

Since last 15 years, not a single election has conducted peacefully without use of money or muscle power and domestic violence. Sometimes rival candidates got killed in a bid to have the elections cancelled. All these acts of lawlessness and violence have become possible because of the growing links

⁶⁸ AIR 2002 SC 2112

⁶⁹ <http://www.weeklyblitz.net/2213/increasing-criminalization-of-politics-in-india>



between many politicians and criminal/anti-social elements. Some of the Bigwigs in this field who have left a mark at being people who have committed heinous crime and acted as leader's are:

Mohammad Sahabuddin was elected to four successive terms in the Indian Parliament from 1996-2008 from Siwan constituency Bihar on RJD ticket. In 1996, Sahabuddin was named as a Minister of State for the Home Ministry in the H.D. Deve Gowda government. He is currently serving a life sentence for kidnapping with intent to murder and as many as 34 cases of serious crime are pending against him.

Mukhtar Ansari is commonly referred to as "the Sahabuddin of UP", is an Indian politician from Maunath Bhanjan or Mau in Eastern Uttar Pradesh. Most recently he won the Mau seat in the Uttar Pradesh Elections, 2007 as an Independent while lodged initially at Ghazipur jail.

Atiq Ahmad he was a member of the 14th Lok Sabha from the Phulpur Lok Sabha Constituency in Uttar Pradesh. He is currently in prison facing trial in 35 criminal cases including several cases of murder. In the Indian general elections, 2009, Atiq Ahmad was allowed to run for election since he is yet to be convicted in any case.

Criminalization of politics in India has attained a stage, where it needs serious attention from the citizens, government and political parties as there was a steady decline in values of all sections of our society. Criminalization of politics has led to immense pressure on functioning of political institution. The worst part of picture is that "criminal record" becomes an essential qualification for entry into politics. In India

Politics is not a social service anymore, instead it emerged as a lucrative profession or business.

Eligibility of candidates with criminal cases pending against them

Recommendations

The Election Commission proposed in its 2004 report that Section 8 of the Representation of the People Act, 1951 should be amended to disqualify candidates accused of an offence punishable by imprisonment of 5 years or more even when trial is pending, given that the Court has framed charges against the person. In the report the Commission addresses the possibility that such a provision could be misused in the form of motivated cases by the ruling party. To prevent such misuse, the Commission suggested a compromise whereas only cases filed prior to six months before an election would lead to disqualification of a candidate. In addition, the Commission proposed that Candidates found guilty by a Commission of Enquiry should stand disqualified. In 1997, the Election Commission issued an order requiring candidates to submit affidavits about their convictions for any of the above criminal offences. However there was no provision in the election law to make this information available to the voter. The Law Commission gave voice to the growing feeling among voters that it was not enough to disqualify criminals found guilty by a court.

3. Right to Know About Candidates.

In order to make democracy healthy & unpolluted, citizens have right to know about Candidates to whom they prefer as their



Representative. To stop criminalization and in the public interest the past of candidate should not kept in dark. In the case of Union of India V/s Association for Democratic Reforms⁷⁰.

Supreme Court agreed with Delhi High Court and in judgment directed the Election Commission to take necessary information on affidavit from candidates as it is part of his nomination paper. Election Commission must take such information which is mandatory including;

- a) His/her criminal antecedents, whether convicted or acquitted? Whether punishable with imprisonment or fine?
- b) Prior to 6 months of filing nomination paper he is an accused of any offence punishable with imprisonment of 2 years? Whether Court has taken its cognizance, if so details thereof.
- c) The assets (movable, immovable, bank balance) of a candidate and his or her spouse and dependants.
- d) Liabilities, if any, particularly over dues of any public financial institution or government.
- e) Educational qualification of the candidate.

However, failing to furnish required information on nomination papers shall be liable to reject nomination papers by the Returning Officer. Furnishing wrong and incomplete information also liable for penal action. This information is available to the general public, and to the print and electronic media, free of cost.

There should be provision compelling winning candidates periodically to report his work to constituency and measures taken by

him for people grievances as remedy. This sense of accountability must be given legal shape and punishment for default. There are other important innovations to make specially elections clean, candidate competent and incorruptible. Invigilation is important from the beginning to the end of the election process. In Common Cause- A Registered Society vs. Union of India[1] the question about the election expenses incurred by the political parties, it was argued that elections in India are fought with money power and so the people should not the money incurred by the political parties and the candidates in election. The Court ruled that purity of election is fundamental to democracy and the commission can ask the candidates about the expenditure incurred by the candidates and by a political party for this purpose. In a democracy where rule of law prevails this type of naked display of black money cannot be permitted. Thus, commission has power to issue directions requiring the political parties to submit to the Election Commission for its scrutiny, the details of the expenditure incurred.

In Union of India vs. Association for Democratic Reforms[2] the Supreme Court directed the Election Commission to issue certain directions to candidates to file an affidavit detailing information about themselves under certain specific heads. This was done to stop criminalization of politics. People have a right to know about the candidate for whom they are being urged to vote. The Right to know flows from 19(1)(a). When law is silent Article 324 is a reservoir of power to act for the purpose of having free and fair elections.

⁷⁰ Add the citation



Article 324 is geared to the accomplishment of free and fair elections expeditiously. However the commission needs to exercise its power with fairness and not arbitrarily. The Court has observed that no body will deny that the election commissioner in our democratic scheme is a central figure and a high functionary. The election commission has to exercise its power in accordance with the existing law and not in derogation thereof. There are the Courts to strike down any misuse of power by the Commission.

4. Restriction of timing for canvassing

The commission has issued an order limiting the hours for use of loud speakers for election purposes only between 8 Am to 7 PM in evening. Beside this canvassing was restricted to two days before the polls. The order was made to avoid noise pollution and disturbance of peace and general public at total. There had been several writ petition filled in this context. The high court expressly declared this power not included in art 324. However supreme court gave its sanction as soon as this reached the house of law at apex court⁷¹

WHAT COULD BE THE EXTENT OF JUDICIAL INTERVENTION?

In order to save its people from the curse of bad legislature, Constitution provides for a strong and distinct Election Commission and an independent of Judiciary. Judiciary in India enjoys a very distinct position as it is the guardian and custodian of the Constitution. Indian Judiciary is “truly the

only defensive armor of the country for its Constitution and laws”.

Corruption today is not only affecting the social life of the country but also rights of the people whose representatives today are making laws. The Law Commission in its 170th Report has recommended various changes in the Representative of the Peoples Act, 1951 and Rules 1961. Many Election Commission Reports have suggested various changes in the above mentioned laws. But, Parliament would not be able to take harsh steps as it directly affects the members of Parliament. Therefore there is a need of strengthening Election Commission and intervention of Judiciary for having a free and fair election. The Supreme Court of India may lay down guidelines in these regards under article 142 of the Constitution as done in the *Vishaka case*⁷² till a suitable legislation is enacted. As stated by the Supreme Court in *Vineet Narain case*⁷³ “In exercise of the power of the Court under Article 32 read with Article 142, guidelines and directions have been issued in a large number of cases and a brief reference to a few of them is sufficient. In *Erac Sam Kanga v. Union of India*⁷⁴, the Constitutional Bench laid down certain guidelines relating to the Emigration Act. In *Lakshmi Kant Pandey v. Union of India*⁷⁵ (In re: Foreign Adoption), guidelines for adoption of minor children by foreigners were laid down. Similarly in the cases of *State of West Bengal v. Sampat Lal*⁷⁶, *Union Carbide Corporation v. Union of India*⁷⁷, *Dinesh Trivedi (MP) v. Union of India* etc.

⁷¹ ECI v All India Anna Dravida Manetra Kazangam 1994 2 SCC 689

⁷² See *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241

⁷³ See *Vineet Narain*, (1998) 1 SCC 226

⁷⁴ See *Erac Sam Kanga v. Union of India*, WP No. 2632 of 1978 decided on 20.3.1979

⁷⁵ See *Lakshmi Kant Pandey v. Union of India*, (1984) 2 SCC 244

⁷⁶ See *State of West Bengal v. Sampat Lal*, (1985) 1 SCC 317

⁷⁷ See *Union Carbide Corporation v. Union of India*, (1991) 4 SCC 584



guidelines were laid down having the effect of laws, requiring rigid compliance.” Recently in the Vishaka case⁷⁸ guidelines have been laid down for observation in workplaces relating to sexual harassment of working women. In this case Supreme Court said that “The obligation of this court under Article 32 of the Constitution of India for the enforcement of these fundamental rights in the absence of legislation must be viewed along with the role of judiciary envisaged in the Beijing statement of Principles of the Independence of the judiciary in the LAWEASIA region. These principles were accepted by the Chief Justice of Asia and the Pacific at the Beijing in 1995 (As amended at Manila, 28th August 1997) as those representing the minimum standard necessary to be observed in order to maintain the independence and effective functioning of the judiciary. The objective of the judiciary mentioned in the Beijing Statement is: Objectives of the Judiciary

- The objective and functions of the judiciary include the following:-
1. To ensure that all persons are able to live securely under the rule of law.
 2. To promote within the proper limits of the judicial functions, the observance and the attainment of human rights, and
 3. Administer the law impartially among person and between persons and the state”

It is pointed out in Vishaka that it is the duty of the executive to fill the vacuum by executive orders because its field is coterminous with that of the legislature, and where there is inaction even by the executive, for whatever reason, the judiciary must step in, in exercise of its Constitutional obligation

under the aforesaid provision to provide a solution till such time as the legislature acts to perform its role by enacting proper legislature to cover the field.

On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature step into substitute then by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under article 141 and, by virtue of Article 144, it is the duties of all authorities, civil and judicial, in the territory of India to act in aid of this court.

Conclusion

Election commission is a statutory authority created for proper functioning of the election in India.

It serves a purpose not only as that of a body conducting election but a body which can be the wheel of democracy in India. It makes all the attempt to have a smooth functioning of the election in the country

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⁷⁸ See Supra,23



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