CHAPTER XIX

ELECTIONS

SYNOPSIS

A. INTRODUCTORY

The Preamble to the Constitution declares India to be a Democratic Republic. Democracy is the basic feature of the Indian Constitution.[1]

Democracy is sustained by free and fair elections. Only free and fair elections to the various legislative bodies in the country can guarantee the growth of a democratic polity. It is the cherished privilege of a citizen to participate in the electoral processes which place persons in the seats of power.

India has been characterised as the biggest democracy in the world because of the colossal nature of the elections held in the country. At a general election, an electorate of millions goes to the polls to elect members for the Lok Sabha,[2] State Legislative Assemblies,[3] and the Legislatures of the Union Territories.[4] Free and fair election has been held to be a basic feature of the Constitution.[5]

B. FUNDAMENTAL PRINCIPLES OF ELECTIONS

A few fundamental principles underlie elections to the Lok Sabha and the State Legislative Assemblies. These principles are stated as follows:

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1. *Supra*, Ch. I, Sec. E.
Also see, *infra*, Ch. XXXIV, Sec. A.
2. *Supra*, Ch. II.
3. *Supra*, Ch. VI.
4. *Supra*, Ch. IX.
5. For discussion on this Doctrine, see, *infra*, Ch. XLI.

(1) There is one general electoral roll for every territorial constituency [Art. 325].

The Constitution abolishes separate electorates and communal representation which divided the Indian people and retarded the growth of Indian nationalism in the pre-Constitution era.

(2) No person is ineligible for inclusion in the electoral roll on the grounds only of religion, race, caste, sex or any of them [Art. 325].

Equality has thus been accorded to each citizen in the matter of franchise and the electoral roll is prepared on a secular basis.[6]

(3) No person can claim to be included in any special electoral roll for any constituency on grounds only of religion, race, caste, sex or any of them [Art. 325].

The principle underlying this provision is further fortified by Art. 15 which bans discrimination against any citizen on grounds of religion, sex, etc. in political as well as other Rights.[7]

The Supreme Court has emphasized that Art. 325 is of crucial significance insofar as it seeks to promote the secular character of the Constitution by outlawing any claim to vote, or denial to vote, on the ground of religion. Secularism is a basic feature of the Constitution.[8]

(4) Elections are held on the basis of adult suffrage, that is to say, every person who is (*i*) a citizen of India, (*ii*) not less than 18 years of age on a date prescribed by the Legislature, and (*iii*) not otherwise disqualified under the Constitution, or any law made by the Legislature, on the ground of non-residence, unsoundness of mind, crime, corrupt or illegal practice, is entitled to be registered as a voter at any such election [Art. 326][9].

Under this constitutional provision, Parliament has laid down a few conditions which a person has to fulfil to be enrolled as a voter, such as, a person is disqualified for registration in the electoral roll of a constituency for Assembly or the Lok Sabha if—(*i*) he is not a citizen of India, or (*ii*) has been declared to be of unsound mind by a competent court. or (*iii*) is disqualified from voting under a law relating to corrupt and illegal practices and other offences in connection with elections.

It is clear from these provisions that only a citizen of India can be enrolled as a voter. When the name of a person is to be entered in the electoral roll, he may be required to satisfy the Electoral Registration that he is a citizen of India. But, if the name of a person has already been entered in the electoral roll, his name cannot be removed from the roll on the ground that he is not a citizen of India unless the concerned officer has given him a reasonable opportunity of being heard according to the principles of natural justice.[10]

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6. *V.V. Giri v. D.S. Dora*, AIR 1959 SC 1318 : (1960) 1 SCR 426. Also see, Art. 14, *infra*, Ch. XXI.

7. For discussion on Art. 15, see, *infra*, Ch. XXII.

8. For discussion on the concept of secularism see, *infra*, Ch. XXIX, Sec. A; Ch. XIII, Sec. E(b), *supra.*

9. Also see, *supra*, Ch. II, Sec. D; Ch. VI, Sec. B(iii).

10. *Lal Babu Hussein v. Electoral Registration Officer*, AIR 1995 SC 1189, 1194 : (1995) 3 SCC 100.

No person is entitled to be registered in the electoral roll for more than one constituency, or of any constituency more than once. Further, any person convicted of any of the specified offences punishable with imprisonment, or who upon the trial of an election petition is found guilty of any corrupt practice, is disqualified for voting at any election for 6 years. This qualification may, however, be removed by the Election Commission for reasons to be recorded by it in writing. Subject to these conditions, every citizen of India, who is not less than 18 years of age, and is ordinarily resident in a constituency, is entitled to be registered in the electoral roll for that constituency.

(5) No reservation of seats has been made in any House for any community, section, or religious group of the Indian population except for the Scheduled Castes, Scheduled Tribes and Anglo-Indians.[11]

C. NATURE OF THE RIGHT TO VOTE OR CONTEST AN ELECTION

In *Ponnuswami*,[12] the Supreme Court has declared:

> "The right to vote or stand as a candidate for election is not a civil right but is a creature of statute or special law and must be subject to the limitations imposed by it."

In *Jamuna Prasad Mukhariya v. Lachhi Ram*[13], the Supreme Court has observed:

> "…..The right to stand as a candidate and contest an election is not a common law right. It is a special right created by statute and can only be exercised on the conditions laid down by the statute. The Fundamental Rights Chapter has no bearing on a right like this created by statute….."

Again, in *Jyoti Basu v. Debi Ghosal*[14], the Supreme Court has observed:

> "A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a Fundamental right nor a common law right. It is pure and simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, creations they are, and therefore, subject to statutory limitation".

The Supreme Court has observed in *Nalla Thampy*:[15]

> "Outside of statute, there is no right to elect, no right to be elected. Statutory creations they are, and, therefore, subject to statutory limitations".

S. 62(5) of the Representation of the People Act, 1951, debars a person from voting at an election if he is confined in a prison under a sentence of imprisonment, or is in the lawful police custody, but not if he is in preventive detention. In *Anukul Chandra Pradhan v. Union of India*,[16] the Supreme Court upheld the va-

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11. See under 'Safeguards to the Minorities,' *infra*, Ch. XXXV.
12. *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, AIR 1952 SC 64 at 71 : 1952 SCR 218.
13. AIR 1954 SC 686 at 688 : (1955) 1 SCR 608.
14. AIR 1982 SC 983, at 986 : (1982) 1 SCC 691.
15. *P. Nalla Thampy Thera v. B.L. Shankar*, AIR 1984 SC 135 : 1984 Supp SCC 631.
16. AIR 1997 SC 2814 : (1997) 6 SCC 1.

lidity of the provision on two grounds. First, it was not hit by Art. 14.[17] Secondly, the Court ruled:[18]

> "….. the right to vote is subject to the limitations imposed by the statute which can be exercised only in the manner provided by the statute; and that the challenge to any provision in the statute prescribing the nature of right to elect cannot be made with reference to a Fundamental Right in the Constitution. The very basis of challenge to the validity of sub-sec. (5) of Section 62 of the Act is, therefore, not available and this petition must fail."

This author begs to differ from some of the assertions made by the Supreme Court in the above observations. It appears to the author that the Supreme Court has not given due regard to the provisions of Arts. 325 and 326. It may be true to say that the right to vote is neither a common law right nor a Fundamental Right. But it is also not purely a statutory right but much more substantive than that. The right to vote is not the gift of the Legislature but flows from the Constitution. In the first place, free and fair election has been declared to be a basic feature of the Constitution which means that no statute can completely negate the right to vote.[19]

Secondly, under Art. 326, the right to vote is a constitutional right. A person who has reached the age of 18 is "entitled" to vote. A person may be disqualified to vote by a statute but only on such grounds as "non-residence, unsoundness of mind, crime or corrupt or illegal practice." No statute can disqualify a voter on any other ground. Under Art. 325, no voter can be debarred from voting "on grounds only of religion, race, caste or sex". Further this means that, any statute passed by a legislature to regulate the right to vote has to fall within the parameters set out by Arts. 325 and 326. Any law infringing these parameters will be void. Therefore, the right to vote is not purely a gift of a statute. The right to vote has also a constitutional basis. Suppose, for the sake of argument, through a Constitutional amendment, Parliament is made a nominated, instead of an elected body. Will not such an amendment be held unconstitutional as it seeks to nullify two basic structures of the Constitution, *viz*., democracy and free and fair elections—the two crucial Constitutional values.

In the third place, it is difficult to appreciate as to why the electoral law should be immune from being challenged under Fundamental Rights. A law may make discriminatory provisions. Can such a law be held immune from a challenge under Art. 14? The law of elections cannot be left completely to the sweet will of the legislature. It is necessary to ensure that the legislature does not make irrational or unreasonable provisions to curtail the right to vote as "free and fair election" and 'democracy' are the basic features of the Constitution.[20]

In the fourth place, the right to stand for an election is conferred by Arts. 84(b) and 173(b).[21] The basic qualifications that a person who has reached the age of 25 years can contest for a seat in the Lok Sabha or the State Assembly cannot be taken away by any law. What a statute can do is to lay down qualifications and disqualifications for a candidate [Arts. 102(e) and 190(e)], and also make procedural provisions regarding filing of nomination paper, etc. But no statute can

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17. For discussion on Art. 14, see, Chapter XXI.
18. AIR 1997 SC 2814 at 2817 : (1997) 6 SCC 1.
19. See, Ch. XLI, *infra.*
20. For discussion on the Doctrine of 'Basic Features of the Constitution", see, *infra*, Ch. XLI.
21. See, *supra*, Chs. III and VI.

completely negate or tamper with the right conferred by Arts. 84 and 173 to contest an election for Lok Sabha or a State Legislative Assembly.

In the fifth place, the right to challenge an election through an election petition is conferred by Art. 329(b) and is, thus, a constitutional right. What remains for the legislature to do is to prescribe the forum and the procedure for deciding the election petitions. No legislature can refuse to set up any machinery for deciding election petitions.

Finally, while it may be correct to say that voting or contesting for an election is not a Fundamental Right, it does not necessarily follow therefrom that an election law is immune from being challenged *vis-à-vis* a Fundamental Right. There is no valid reason why such a law be treated outside the parameter of Art. 13(2).[22]

Right to vote being a constitutional right, what happens if a legislature imposes an unreasonable and irrational condition thereon? Suppose a legislature were to enact a law debarring handicapped persons from voting or contesting an election, or a law were to debar women from contesting elections, then can it be said that such a law is non-challengeable under Art. 14 as such a law cannot be challenged under Art. 325? It is thus clear that the right to vote and to contest an election are not purely statutory rights and do not depend solely on the sweet will of the Legislature. These Rights have a constitutional base as well and are subject to constitutional provisions as mentioned above.

D. ELECTION COMMISSION

In order to ensure free, fair and impartial elections, the Constitution establishes the Election Commission, a body autonomous in character and insulated from political pressures or executive influence. Care has been taken to ensure that the Commission functions as an independent agency free from external pressures from the party in power, or the executive of the day.

The Commission is set up as a permanent body under Art. 324(1). It is an all-India body having jurisdiction over elections to Parliament, State Legislatures, offices of the President and Vice-President.[23]

The reason for having an all-India body to supervise and conduct elections, rather than separate bodies to organise elections in each State, is that some States have a mixed population, as there are the native people as well as others who are racially, linguistically or culturally different from the native people. A State Government could discriminate against outsiders by so managing things as to exclude them from the electoral rolls and thus deprive them of their franchise which is the most basic right in democracy. In order to prevent injustice being done to any section of the people, it was thought best to have one central body which would be free from local influences and have control over the entire election machinery in the country.[24]

According to Art. 324(1), "the superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, all elections to Parliament and to the Legislature of every State and of elections to the offices of Presi-

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22. See, next Chapter.
23. *Supra*, Chs. II, III, VI.
24. See DR. AMBEDKAR'S speech, VIII CAD, 905-7.

dent and Vice-President held under this Constitution"—have been vested in the Election Commission.

The Election Commission consists of the Chief Election Commissioner [CEC] and such number of Election Commissioners [ECs], if any, as the President may fix from time to time [Art. 324(2)]. All these Commissioners are appointed by the President subject to the provisions of any law enacted by Parliament for the purpose [Art. 325(2)].

The Chief Election Commissioner acts as the Chairman of the Election Commission in case any other Election Commissioner besides him is appointed [Art. 324(3)].

It is clear from these constitutional provisions that the Election Commission consists of the ECE and the ECs as and when appointed by the President. The office of the CEC is envisaged to be a permanent fixure, but that cannot be said for the ECs, as their appointment is optional with the Central Executive. There cannot be an Election Commission without the CEC, but same is not the case with the ECs. Their number can vary from time to time. Art. 324(2) contemplates a statute to define the conditions of service of the CEC and the ECs.

The President may appoint, after consultation with the Election Commission, such Regional Commissioners as the President may consider necessary to assist the Election Commission in the discharge of its functions. The Regional Commissioners may be appointed before each general election to the Lok Sabha and the State Legislative Assemblies, and also before the biennial election to the State Legislative Councils [Art. 324(4)].

As the Regional Commissioners [RCs] are appointed by the President in consultation with the Commission to assist it to perform its functions, the ECs are placed on a higher pedestal than the RCs. While the ECs are members of the Election Commission, the RCs are not its members.

The President may make rules to determine the conditions of service and tenure of office of the Election Commissioners and the Regional Commissioners. This, however, is subject to any law made by Parliament [Art. 324(5)].

The tenure of the Chief Election Commissioner is independent of the executive discretion, for he cannot be removed from his office except in the like manner and on the like grounds as a Judge of the Supreme Court [Proviso to Art. 324(5)].[25] Further, the conditions of service of the Chief Election Commissioner cannot be varied to his disadvantage after his appointment [Proviso to Art. 324(5)]. No such safeguard is provided to the ECs.

These provisions of the Constitution thus concede a security of tenure to the Chief Election Commissioner similar to a Judge of the Supreme Court. He can, therefore, discharge his functions without fear, favour or pressure from the executive or the party in power. The tenure of other Election Commissioners and the Regional Commissioners is also free of the executive control in so far as none of them can be removed from office except on the recommendation of the Chief Election Commissioner [Proviso to Art. 324(5)].

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25. See, Ch. IV, *supra.*

An obligation has been placed on the Central as well as the State Governments to make available to the Election Commission, or to a Regional Commissioner, when requested by the Election Commission, such staff as may be necessary for the Election Commission to discharge its functions [Art. 324(6)].

As elections are held at intervals, therefore, the Election Commission does not employ a large staff on permanent basis. Accordingly, the Election Commission has been given the power to requisition staff as and when it needs from the Central and State Governments.

Art. 324(6) refers to such staff only as falls under the disciplinary control of these governments. Therefore, on a request of the Election Commission, the services of such government servants as are appointed to public services and posts under the Central and State Governments are to be made available for election purposes. This means that the services of the employees of the State Bank of India, which is a statutory body, cannot be requisitioned for election purposes.[26]

(a) COMMISSION—A MULTI-MEMBER BODY

In *S.S. Dhanoa v. Union of India*[27], the Supreme Court has laid down an important proposition regarding the composition of the Election Commission.

Until 1989, the Election Commission consisted of only the Chief Election Commissioner. In 1989, the Central Government changed tracks and sought to appoint Election Commissioners. The underlying purpose of this move seems to be to curb the powers of the CEC who was single handedly exercising the powers of the Election Commission. In 1989, by a notification issued under Art. 324(2), the number of Election Commissioners (besides the Chief Election Commissioner) was fixed at two. By another notification, the President appointed the petitioner and one other person as Election Commissioners as such. The rules made by the President under Art. 324(5) fixed the tenure of these Commissioners at 5 years, or until reaching the age of 65 years, whichever was earlier.

Hitherto, the Election Commission had consisted of only one member, *viz.*, the Chief Election Commissioner. With the addition of two more members, the smooth working of the Commission was adversely affected. Accordingly, on 1st January, 1990, the President issued two notifications under Art. 324(2) rescinding the 1989 notifications creating the two posts of Election Commissioners and appointing two persons to these posts. In this way, from 1990, the Election Commission again reverted to a one-man body. The question arose whether these notifications were constitutionally valid.

The Apex Court did however observe that when an institution like the Election Commission is entrusted with vital functions and is armed with exclusive and uncontrolled powers to execute them, it is both necessary and desirable that the powers are not exercised by one individual, however wise he may be. "It ill-conforms to the tenets of democratic rule." When vast powers are exercised by an institution which is accountable to none, it is politic to entrust its affairs to more hands than one. It helps to assure judiciousness and want of arbitrariness.

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26. *Election Commission of India v. State Bank of India, Staff Assn.,* AIR 1995 SC 1078 : 1995 Supp (2) SCC 13.

27. AIR 1991 SC 1745 : (1991) 3 SCC 567.

After an analysis of the provisions of Art. 324, and review of the debates held in the Constituent Assembly on the matter at issue, the Court laid down the proposition that under Art. 324(1), the status of Election Commissioners is not *pari passu* with that of the Chief Election Commissioner. The Chief Election Commissioner has been given protection in that his conditions of service cannot be varied to his disadvantage after his appointment, and he cannot be removed from his office except in like manner and on like grounds as a Judge of the Supreme Court. These protections are not available to the Election Commissioners. Their conditions of service can be varied even to their disadvantage after their appointment and they can be removed on the recommendation of the Chief Election Commissioner. These provisions indicate that the Chief Election Commissioner is not *primus inter partes, i.e.,* first among the equals, but is intended to be placed in a distinctly higher position than the Election Commissioners.

In this context, the Court held both the 1990 notifications as valid. Art. 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. If the President decided to abolish both the posts of the Election Commissioners either because there was no work for them, or that the Election Commission could not function, there could be nothing wrong with it. The Court stated:

> "The power to create the posts is unfettered. So also is the power to reduce or abolish them."

In the instant case, there was the case not of premature termination of service, but that of abolition of posts and termination of service was a consequence thereof.

From the tenor of the *Dhanoa* decision, it is clear that the Supreme Court has shown preference for a multi-member Election Commission rather than a single member body. The Court has also suggested that rules be made to lay down the procedure to transact the business of the Commission. The Election Commission is not merely an advisory body but an executive body as well.

Parliament has enacted the Chief Election Commissioner and other Election Commissioners (Conditions of Service) Act, 1991. The Act has been amended in 1993. The main feature of the Act is to lay down that the tenure of the CEC and the ECs is for six years subject to the retiring age of 65 years. This means that if they attain the age of 65 years before completing their tenure of six years, they would have to vacate the office. Each of them receives salary equal to that of a Judge of the Supreme Court.

The Act provides that all business of the Election Commission "shall, as far as possible, be transacted unanimously", but, in case of difference of opinion between the CEC and the other ECs, the matter "shall be decided according to the opinion of the majority". Further, it is provided that the Election Commission may, "by unanimous decision, regulate the procedure for transaction of the business as also allocation of the business amongst the CEC and other ECs".

The Act thus places the CEC and the ECs on par in matters of tenure, salaries, etc. However, the position of the CEC does differ from that of the ECs in two respects:

(1) According to the proviso to Art. 324(4), the CEC is not to be removed from his office except in like manner and on the like grounds as a Supreme Court Judge.

(2) The conditions of service of the CEC are not to be varied to his disadvantage after his appointment.

These two limitations on the power of Parliament are designed to protect the independence of the CEC from political and executive interference.

On the other hand, an EC [proviso to Art. 324(5)], is not to be removed from office except on the recommendation of the CEC. This provision also ensures the independence of the ECs. As the Supreme Court has observed in *T.N. Seshan v. Union of India*,[28] "the recommendation for removal must be based on intelligible, and cogent considerations which would have relation to efficient functioning of the Election Commission." This is so because the power is conferred on the CEC to ensure the independence of the ECs from political and executive bosses of the day. This is to ensure the independence of not only these functionaries but the Election Commission as a body.

Having insulated the CEC from external political and executive pressures, confidence was reposed in this independent functionary to safeguard the independence of his ECs by enjoining that they cannot be removed except on the CEC's recommendation. They have been placed under the protective umbrella of the independent CEC. If, therefore, the CEC were to exercise his power "as per his whim and caprice", he would become an instrument of oppression and this would destroy the independence of the Election Commission if the ECs "are required to function under the threat of the CEC recommending their removal". "It is, therefore, needless to emphasize that the CEC must exercise this power only when there exist valid reasons which are conducive to efficient functioning of the Election Commission.[29]

In 1993, the Central Government again decided to convert the Election Commission into a multi-member body. Accordingly, two notifications were issued on 1/10/93. According to one, the number of ECs was fixed at two. According to the other, two persons were appointed as the ECs. Thereupon, the incumbent CEC, T.N. Seshan, challenged the notifications as well as the changes made in the above-mentioned Act in 1993 as unconstitutional. The gist of his argument was that either there should not be a multi-member Election Commission, or that he as the CEC should have the sole decision-making power and that the other ECs should act merely as advisers. The CEC claimed that he was the sole repository of all power exercisable by the Commission falling within the scope of his activity.

In *T.N. Seshan v. Union of India*,[30] the Supreme Court rejected the arguments of the CEC and upheld the appointment of the ECs as well as of the provision in the Act requiring a unanimous decision, failing which a majority decision by the Commission on all matters coming before it.

The Court has maintained that the scheme of Art. 324 clearly envisages a multi-member body comprising the CEC and ECs. "The concept of plurality is

28. (1995) 4 SCC 611 at 625 : (1995) 5 JT 337.
29. *Ibid.*
30. *Supra*, footnote, 28.

writ large on the face of Art. 324(2)" which "clearly envisages a multi-member Election Commission comprising the CEC and one or more ECs". The Court has argued that if a multi-member body was not envisaged by the Constitution, then where was the need for providing in Art. 324(3) for the CEC to act as its chairman? Therefore, the notifications appointing the two ECs could not be faulted on this ground.

The Court also referred to what was said in *Dhanoa* emphasizing upon the desirability of having a multi-member body instead of leaving all power in the hands of a single person, *viz.*, the CEC who was accountable to none.

The Court has also rejected the argument of the CEC that a multi-member body would be unworkable. The Constitution-makers felt the need to provide for a multi-member body. To accept the argument that a multi-member body is unworkable would tantamount to destroying or nullifying Arts. 324(2) and (3). On this point, the Court has observed:[31]

> "We cannot overlook the fact that when the Constitution-makers provided for a multi-member Election Commission they were not oblivious of the fact that there may not be agreement on all points, but they must have expected such high-ranking functionaries to resolve their differences in a dignified manner. It is the constitutional duty of all those who are required to carry out certain constitutional functions to ensure the smooth functioning of the machinery without the clash of egos."

The Court has also rejected the argument that the CEC ought to have the sole decision-making power. The Court has pointed out that under Art. 324(3), the CEC acts as the Chairman of the multi-member body. As such, he presides over the meetings of the Commission. This does not mean that he has the sole decision-making power and the other ECs are merely advisers. It is the common practice of multi-member bodies to reach their decisions either unanimously or by majority vote. This is what is sought to be laid down in the Act mentioned above. To concede the final word to the CEC on all matters would render the ECs to the status of mere advisers and this does not emerge from the scheme of Art. 324.

The Election Commission is now a multi-member body having one CEC and 2 CEs. There are however several differences between the CEC, on the one hand, and the CEs, on the other. First, the CEC is the Chairman of the Commission. Two, he cannot be removed from office except in the same manner and on the same grounds as a Supreme Court Judge. Three, his conditions of service cannot be varied to his disadvantage. Four, the Election Commission cannot exist without the CEC while it is not compulsory to have ECs.

An EC, on the other hand, cannot be removed except on the recommendation of the CEC, and the terms and conditions of his service can be changed to his disadvantage during his term unlike the CEC. Thus, while the Constitution protects the independence of the CEC, it leaves it to him to protect the independence of the ECs and, thus, of the entire Commission. In all other matters, because of the Act, mentioned above, the ECs and the CEC stand *pari passu,* and some constitutional differentiation between the CEC and the ECs does not confer a superior status on the CEC to the ECs.

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31. (1995) 4 SCC 611 at 627 : (1995) 5 JT 337.

The reason for the constitutional differentiation between the positions of the CEC and the ECs is that while the constitution-makers wanted to institute a permanent Election Commission, they took the view that it was not necessary to have a large body all the time because elections would be held once in five years. The membership of the Commission could be increased by adding the CEs when the volume of work increased at the election time. Thus, the constitution-makers envisaged only the CEC, and not the CEs, as permanent incumbents. Things have changed now. Elections have now become a continuous feature of the Indian Polity, and, therefore, a multi-member body has become a necessity.

The Supreme Court has however clarified that only because the procedure and grounds for the removal of the CEC are the same as for a Supreme Court Judge, it does not equate the CEC to a Supreme Court Judge.[32]

It is suggested that since a multi-member Election Commission has now become the order of the day, it seems to be necessary to amend Art. 324 as regards the composition of the Commission. Provision should be made for the appointment of a three member body, all members ranking *pari passu,* the Chief Election Commissioner being designated as the Chairman of the body. In all other respects, all the members should enjoy the same status.

As stated above, the Supreme Court in *Dhanoa* has laid emphasis on the Election Commission being a multi-member, rather than a single member, body. The reasons is simple: it is safer to entrust power to a multi-member, rather than a single member, body.

(b) POWERS AND FUNCTIONS OF THE ELECTION COMMISSION

The Election Commission plays a pivotal role in the electoral mechanism of the country. The Election Commission primarily exercises administrative functions but it also has some adjudicative and legislative functions as well.

Art. 324(1) assigns the following functions to the Election Commission:

(1) The superintendence, direction and control of the preparation of the electoral rolls for all elections to Parliament, State Legislatures, offices of the President and Vice-President;

(2) Conduct of all these elections.

The powers of the Commission flow from Art. 324. The superintendence, direction and control of the entire electoral process in the country is vested in the Election Commission. The words "superintendence, direction and control" are of wide amplitude. These words are enough to include all powers necessary for the smooth and effective conduct of elections so that the will of the people may be expressed.[33]

The term 'election' in Art. 324 has been used in a wide sense so as to include the entire process of election which consists of several stages and it embraces many steps, some of which may have an important bearing on the result of the process. However, the general powers of superintendence, direction and control of the elections vested in the Election Commission under Art. 324(1) are subject

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32. See *Seshan,* (1995) 4 SCC 611 at 639 : (1995) 5 JT 337.

33. *Election Commission of India v. Ashok Kumar,* (2000) 8 SCC 216 : AIR 2000 SC 2979; *Lalji Shukla v. Election Commission,* AIR 2002 All 73.

to any law made either by Parliament under Art. 327, or by the State Legislatures under Art. 328 of the Constitution.[34]

Art. 324(1) is a plenary provision vesting the whole responsibility in the Election Commission for National and State elections. The Constitution contemplates free and fair elections and for this purpose vests responsibilities, directions and control of the conduct of elections in the Election Commission. This responsibility confers powers, duties and functions of many sorts, administrative or others, depending on the circumstances.

The Supreme Court has however cautioned that under Art. 324(1), the Commission does not exercise untrammelled powers otherwise it will become an *imperium in imperio* which no one is under the Indian Constitution. Ultimately, it is for the courts to decide what powers can be read into Art. 324(1).

If the law makes no provision to meet a situation, Art. 324 enables the Commission to act to push forward a free and fair election with expedition. Art. 324 makes comprehensive provision to take care of surprise situations. The Commission can order a re-poll for the whole constituency under compulsion of circumstances. Art. 324 confers on the Election Commission necessary powers to conduct the elections including the power to countermand the poll in a constituency and ordering a fresh poll therein because of hooliganism and breakdown of law and order at the time of polling or counting of votes. The Commission is subject to Rule of Law; it must act *bona fide* and be amenable to the norms of natural justice in so far as enforcement of such canons can reasonably and realistically be required of it as fair-play-in-action in the most important area of constitutional law, *viz.*, election.

The Supreme Court has ruled in *Mohinder Singh v. Chief Election Commissioner*[35] that the Commission should exercise its power of cancelling a poll according to the principles of natural justice.

The Election Commission has power to review its decision as to the expediency of holding the poll on a particular date.[36]

The Supreme Court has ruled in *Digvijay Mote v. Union of India,*[37] that the conduct of election is in the hands of the Election Commission which has the power of superintendence, direction and control of elections vested in it as per Art. 324 of the Constitution. Consequently, if the Election Commission is of the opinion that having regard to the disturbed conditions in a State, or a part thereof, free and fair elections cannot be held, it may postpone the same. However, this power is not uncontrolled. It is subject to judicial review as it is a statutory body exercising its functions affecting public law Rights. The judicial review will depend on the facts and circumstances of each case. The Court emphasized that the power conferred on the Election Commission by Art. 324 has to be exercised not mindlessly nor *mala fide* nor arbitrarily nor with partiality but in keeping with the

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34. See, *infra*, Sec. E.

35. AIR 1978 SC 851 : (1978) 1 SCC 405.

36. *Mohd. Yunus Saleem v. Shiv Kumar Shastri,* AIR 1974 SC 1218 : (1974) 4 SCC 854.
Also, *Election Commission v. State of Haryana,* AIR 1984 SC 1406 : 1984 Supp SCC 104.

37. (1993) 4 SCC 175.
Also, *Election Commission v. State Bank of India*, AIR 1995 SC 1078 : 1995 Supp (2) SCC 13.

guidelines of the Rule of Law and not stultifying the presidential notification nor existing legislation.

The Election Commission issued an order limiting the hours for using loud-speakers for electioneering purposes between 8 A.M. to 7 P.M. The order was made to avoid noise pollution and disturbance of peace and tranquility of the public in general. The order was challenged by a political party through a writ petition in the High Court. The High Court took the view that there was no nexus between the restrictions imposed and the power under Art. 324.

The Election Commission appealed to the Supreme Court. The Court without deciding the question whether the Commission has any such power to make such an order under Art. 324(1) in view of the pendency of the writ petition in the High Court, set aside the *interim* order passed by the High Court because "the *prima facie* position and the balance of inconvenience seem to be in favour of the aspect of public good in a matter which cannot be said to be unrelated to the area of the powers of the Election Commission under Art. 324". But, then, "granting *prima facie*, the existence of the power of the Election Commission", the Court held the impugned order too restrictive and, accordingly, banned the use of the loud-speakers during 10 P.M. and 6 A.M. and modified the order issued by the Election Commission accordingly.[38]

In May, 1982, during the elections for the Kerala State Legislative Assembly, electronic voting system was introduced at some polling booths in one constituency. This was done under the directions of the Election Commission issued under Art. 324. After the completion of the election, the validity of the electronic voting system was challenged through an election petition. In *Jose*[39], the Supreme Court setting aside the election of the successful candidate, ordered re-poll in such polling booths where the machines had been used.

The Court ruled that the order of the Commission directing the casting of ballots by machines was without jurisdiction. The Election Commission could not change the voting system as this matter fell within the domain of Parliament. The Court interpreted the word 'ballot' used in the Representation of the People Act as not including the casting of votes by any mechanical process. The Court construed Art. 324 as conferring only executive, but not legislative, powers on the Election Commission. Legislative powers in respect of elections to Parliament and the State Legislatures vest in Parliament and no other body and the Election Commission would come into picture only if no provision has been made by Parliament in regard to these elections.

The Court disagreed with the contention that the Constitution gives complete power to the Commission under Art. 324 for the conduct of elections. The Constitution could never have intended to make the Commission as an apex body in respect of matters relating to the elections and conferring on it legislative powers ignoring Parliament altogether. The Supreme Court laid down the following propositions as regards the power of the Commission under Art. 324:

(1) When there is no law or rule made under the law, the Commission may pass any order in respect of the conduct of elections.

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38. *Election Commission of India v. All India Anna Dravida Munetra Kazahagam*, 1994 Supp (2) SCC 689.

39. *A.C. Jose v. Sivan Pillai*, AIR 1984 SC 921 : (1984) 2 SCC 656.

(2) When there is an Act and rules made thereunder, it is not open to the Commission to override the same and pass orders in direct disobedience to the mandate contained in the rules or the Act.

This means that the powers of the Commission are meant to supplement, rather than supplant, the law and the rules in the matter of superintendence, direction and control provided by Art. 324.

(3) Where the law or the rules are silent, the Commission no doubt has plenary powers under Art. 324 to give any direction in respect of the conduct of elections.

(4) In the absence of any specific provision to meet a contingency, the Election Commission can invoke its plenary power under Art. 324.[40]

But when the Commission submits a particular direction to the Government for approval (as required by the rules), it is not open to the Commission to go ahead with the implementation of that direction at "its own sweet will", even though government approval is not given.

Rule 5(1) of the Rules made by the Central Government under the Representation of the People Act, 1951 (RPA), empowers the Election Commission to specify the symbols which candidates for election may specify. Other rules make provisions for allotment of symbols to the candidates. The Election Commission has issued the Symbols Order, 1968, under Art. 324 read with these Rules. The validity of this order has been challenged from time to time on the ground *inter alia* that the Order being legislative in character is *ultra vires* the Commission because the Commission has executive, but not legislative power under Art. 324. The Supreme Court has always upheld the validity of the Order.[41]

The Court has explained that in India, allotment of symbols to the candidates becomes necessary so that an illiterate voter may identify the candidate of his choice and cast his vote in his favour. The Symbols Order makes provisions for the reservation, choice and allotment of symbols and the recognition of political parties in connection therewith. The power to allot symbols has been conferred on the Election Commission by the Rules made under the RP Act. The power to issue the Symbols Order is comprehended within the power of "superintendence, direction and control' of elections vested in the Election Commission.

The Court has upheld the Order without characterising it as 'legislative' but treating it as "a compendium of directions in the shape of general provisions to meet the various kinds of situations appertaining to elections with particular reference to symbols", and the Election Commission has power to make such an order in its own right under Art. 324. The Supreme Court has observed in *APHLC*:[42] "The power to make these directions 'whether it is a legislative activity or not', flows from Art. 324, as well as from Rules 5 and 10".

The Court has reiterated in *Roop Lal Sathi v. Nachhattar Singh*,[43] that the Symbols Order is "in the nature of general directions issued by the Election

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40. *N. Krishnappa v. Chief Election Commissioner*, AIR 1995 AP 212.

41. *Sadiq Ali v. Election Comm.*, AIR 1972 SC 187 : (1972) 4 SCC 664; *APHLC Shillong v. M.A. Sangma*, AIR 1977 SC 2155 : (1977) 4 SCC 161; *Kanhaiya Lal Omar v. R.K. Trivedi*, AIR 1986 SC 111 : (1985) 4 SCC 628; *Jagannath Mohanta v. Election Commission of India*, AIR 2000 Ori 44; *Krishna Mohan Sharma v. Jai Bhadra Singh*, AIR 2001 All 175.

42. *APHLC, supra*, footnote 41, at 2164.

43. AIR 1982 SC 1559 : (1982) 3 SCC 487.

Commission to regulate the mode of allotment of symbols to the contesting candidates." But the Supreme Court giving a wider scope to Art. 324 has observed in *Kanhaiya Lal*:[44]

> " Even if for any reason, it is held that any of the provisions contained in the Symbols Order are not traceable to the Act or the Rules, the power of the Commission under Art. 324(1) of the Constitution which is plenary in character can compass all such provisions. Art. 324 of the Constitution operates in areas left unoccupied by legislation and the words 'superintendence', 'direction' and 'control' as well as 'conduct of all elections' are the broadest terms which would include the power to make all such provisions".

The Court has also stated further—

> "Any part of the Symbols Order which cannot be traced to Rules 5 and 10 of the Rules can easily be traced in this case to the reservoir of power under Art. 324(1) which empowers the Commission to issue all directions necessary for the purpose of conducting smooth, free and fair elections".

The Court has emphasized that "the source of power in this case is the Constitution, the highest law of the land, which is the repository and source of all legal powers and any power granted by the Constitution for a specific purpose should be construed liberally so that the object for which it is granted is effectively achieved".

The tenor of these cases is that the Election Commission has power under Art. 324(1) to issue directions with respect to such matters pertaining to elections as are not covered by any law. In Administrative Law, 'directions' are regarded as "administrative" and not "legislative" in nature.[45]

In *Mohinder Singh Gill v. Chief Election Commissioner*,[46] the Supreme Court has lucidly explained the scope of Art. 324. This is a plenary provision vesting the whole responsibility for national and state elections and, therefore, the necessary powers to discharge that function. Art. 324 has however to be read in the light of the constitutional scheme and the Representation of the People Acts, 1950 and 1951.

If competent legislation is enacted, as visualized by Art. 327, the Commission is bound by it. The Commission must act in conformity with, not in violation of the enacted law concerning elections. The Supreme Court has emphasized that no one is an *imperium in imperio* in our constitutional order. The Commission cannot claim to exercise any power under Art. 324 which may be in conflict with the enacted law. When, however, any situation arises for which the law does not provide for, the Commission can exercise power under Art. 324. In the words of the Court:

> "Art. 324, in our view, operates in areas left unoccupied by legislation and the words "superintendence, direction and control' as well as 'conduct of all elections', are the broadest terms".

Thus, when law is silent, "Art. 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.

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44. *Supra*, footnote 41, at 118.
45. JAIN, *A TREATISE ON ADM. LAW*, Vol. I, Ch. VIII.
46. (1978) 1 SCC 405. : AIR 1978 SC 851

In *Common Cause—A Registered Society v. Union of India*,[47] the question about the election expenses incurred by political parties, it was argued that elections in India are fought with money power and so the people should know the sources of the expenditure incurred by the political parties and the candidates in the process of 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, by violating the mandatory provisions of law, cannot be permitted." The court, therefore, ruled that under Art. 324, the commission can issue suitable directions to maintain the purity of election and to bring transparency in the process of election. The 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 or authorised by the parties in connection with the election of their respective candidates. The court further observed that "the Constitution has made comprehensive provision under Art. 324 to take care of surprise situations and it operates in areas left unoccupied by legislation."

Finally, in *Union of India v. Ass. for Democratic Reforms*[48] 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 criminalisation of politics.[49] People have a right to know about the candidate for whom they are being urged to vote. The right to know flows from Art. 19(1)(a). When law is silent "Art. 324 is a reservoir of power to act for the avowed purpose of having free and fair elections. The court has further observed in the instant case:[50]

> "The constitution has taken care of leaving scope for exercise of residuary power by the commission in its own right as a creature of the constitution in the infinite variety of situations that may emerge from time to time in a large democracy, as every contingency could not be foreseen or anticipated by the enacted laws or the rules by issuing necessary directions, the commission can fill the vacuum till there is legislation on the subject".

Art. 324 is geared to the accomplishment of free and fair elections expeditiously. However, the Commission needs to exercise its powers with fairness and not arbitrarily. "Unchecked power is alien to our system". The Court has emphasized that the discretion vested in the Commission is to be exercised "properly, not perversely"; "not mindlessly nor *mala fide*, nor arbitrarily, nor with partiality but in keeping with the guidelines of the Rule of Law and not stultifying the Presidential notification nor existing legislation." The Court has observed further:

> "No body will deny that the Election Commissioner in our democratic scheme is a central figure and a high functionary. Direction vested in him will ordinarily be used wisely, not rashly…."

Howsoever wide the scope of Art. 324 may be, the Election Commission has to exercise its power in accordance with the existing law and not in derogation thereof.

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47. (1996) 2 SCC 752 : AIR 1996 SC 3081.
48. (2002) 5 SCC 294 : AIR 2002 SC 2112.
Also see, *supra*, Ch. II, Sec. D(e).
49. See, Ch. XXIV, Sec. C, *infra*.
50. (2002) 5 SCC 294 at 320 : AIR 2002 SC 2112.

And, ultimately, there are the courts to strike down any misuse of power by the Commission.[51]

Once the election results are declared, the Commission has no jurisdiction with respect to the election. Thereafter, the validity of the election of a candidate can be challenged through an election petition.[52] The Commission itself has no power to decide the legality and validity of an election which is alleged to have been held contrary to any legal provisions. The function of the Commission ends with the declaration of the election resulf.[53]

The Commission also has the function of advising the President or the Governor on the question of disqualification of any member of Parliament [Art. 103(2)],[54] or a member of the State Legislature [Art. 192(2)][55], as the case may be. While the Election Commission itself decides the question of supervening disqualification arising in case of a sitting member of Parliament or of a State Legislature, the power to decide on doubts and disputes arising out of elections as such is not vested in the Election Commission, and arrangements for the same have been made under legislation.[56]

While deciding the question of disqualification of a member of a House of Parliament, or of a State Legislature, the Election Commission functions in a *quasi*-judicial capacity and, therefore, it has to follow the principles of natural justice. One of these principles is the rule against bias.[57]

While deciding the question of disqualification against Ms. Jayalalitha, a member of the Legislative Assembly of Tamil Nadu, there was suspicion of bias against Shree Seshan who was the CEC and the Chairman of the Election Commission. The lawyer wife of the complainant (Dr. Swamy) was professionally engaged as the counsel in a case filed by Shri Seshan. Therefore, the Supreme Court directed in *Election Commission of India v. Subramanian Swamy*,[58] that the CEC should recuse himself from participating in the decision in the first instance and let the two Election Commissioners decide the matter. In case they differ, then the CEC should express his opinion on the ground of necessity.[59]

An important function conferred on the Election Commission by law is the removal of disqualification arising out of conviction for a specified offence, for purposes of voting or standing as a candidate at an election. The Election Commission is required to record the reasons in writing while deciding any such matter.[60]

In case of disqualification arising out of commission of a corrupt practice at an election, it is for the President to determine whether such person shall be disqualified

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51. *Kunwar Raghuraj Pratap Singh v. Chief Election Commissioner of India*, AIR 1999 All 98.
52. See, *infra*, Sec. F.
53. *Chandan Kumar Sarkar v. Chief Election Commr.*, AIR 1995 Gau 61.
54. *Supra*, Ch. II.
55. *Supra*, Ch. VI.
56. *Infra*, Sec. F.
57. On Natural Justice and Bias, see, Ch. VIII, Sec. E, *supra.*
58. AIR 1996 SC 1810 : (1996) 4 SCC 104.
59. For detailed discussion on the concept of bias, see, Jain, *A TREATISE ON ADM. LAW*, I. Ch. Jain, *CASES AND MATERIALS*, I, Ch.
60. See Ss. 11 and 11A of the R.P. Act, 1951. Also see, Chs. II and VI, *supra.*

and for what period. In this situation, the President has to act according to the opinion of the Election Commission.[61]

(c) ELECTION COMMISSION A TRIBUNAL FOR CERTAIN PURPOSES

Under Art. 324, read with the Election Symbols (Reservation and Allotment) Order, 1968, the Election Commission has power to allot symbols for purposes of elections to political parties and to adjudicate upon disputes with regard to recognition of political parties and rival claims to a particular symbol for purposes of elections.

What is the character of the Commission while adjudicating upon the dispute with regard to the recognition of a political party? Is the Election Commission a 'tribunal' under Art. 136 while adjudicating upon such a dispute and can the Supreme Court hear an appeal from the Commission's decision?

In several cases before 1974, the Supreme Court had heard appeals from the Election Commission without however deciding the question whether the Election Commission could be regarded as a 'tribunal' for purposes of Art. 136 in so far as it discharged adjudicatory functions. The Supreme Court had left this question open in these cases.[62] However in *A.P.H.L Conference, Shillong, v. W.A. Sangma,*[63] the Supreme Court held that the Commission is a tribunal for purposes of Art. 136 while deciding such a controversy. "The power to decide this particular dispute is a part of the State's judicial power and that power is conferred on the Election Commission by Art. 324 of the Constitution as also by R. 5 of the Rules."

Cancellation of an allotted symbol to a political party is a *quasi*-judicial matter and the affected party must be given a hearing before making any such order.[64]

Similarly, while deciding the question of supervening disqualification of a sitting member of a House of Parliament, or of a State Legislature, the Commission acts in a *quasi*-judicial capacity.[65]

The Election Commission has various administrative functions, but that does not mean that, while adjudicating a dispute, it does not exercise the judicial power conferred on it by the state. The Commission is created by the Constitution and is invested under the law with not only administrative powers, but also with certain judicial powers however fractional the same may be.

(d) GUJARAT ASSEMBLY ELECTION MATTER[66]

The Gujarat Legislative Assembly was dissolved prematurely, before the expiry of its normal tenure of five years, on 19-7-2002. The last sitting of the dissolved Assembly was held on 3-4-2002. According to Art. 174(1),[67] six months shall not intervene between the last sitting of one session and the date appointed

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61. S. 8A of the R.P. Act, 1951 as amended by the Election Laws (Amendment) Act, 1975. Also see, Chs. II an VI, *supra.*

62. *Sadiq Ali v. Election Commission,* AIR 1972 SC 187 : (1972) 4 SCC 664; *Ramashankar Kaushik v. Election Commission,* AIR 1974 SC 445 : (1974) 1 SCC 271.

63. AIR 1977 SC 2155 : (1977) 4 SCC 161.

64. *Uma Ballav Rath v. Maheshwar Mohanty,* AIR 1999 SC 1322 : (1999) 3 SCC 357.

65. See, *supra*, footnote 58.

66. (2002) 8 SCC 237 : (2002) 8 JT 389.

67. *Supra*, Ch. VI.

for the first meeting of the next meeting. It was argued that election to the Assembly must take place before 3-10-2002, i.e. within six months of the last sitting of the House. On the other hand, the Election Commission was of the view that since the law and order situation in the state was delicate, election could not be held before 3-10-2002 and it would take a few more months thereafter to hold the election. It was this dichotomy of views which became the subject-matter of the reference to the Supreme Court. The main question involved therein related to the interpretation of Art. 174(1) and Art. 324 and the inter-relation between the two provisions, if any, was the Election Commission bound by Art. 174(1) and was bound to hold election to the Gujarat Assembly before 3-10-2002.

The Presidential reference under Art. 143(1) of the Constitution,[68] was heard by a Bench of five learned Judges and three concurring judgments were delivered. The main propositions which emerged from the several judgments are as follows:

(1) Democracy is a part of the basic structure of the Constitution and free and fair elections at regular prescribed intervals are essential to the democratic system. Holding periodic, free and fair elections by the Election Commission are part of the basic structure of the Constitution.[69]

(2) Art. 174(1) relates to an existing, live and functional Assembly. It regulates the frequencies of sessions of existing Houses. Art. 174(1) is mandatory so far as the time period between two sessions of a living and functional House is concerned. But Art. 174(1) does not relate to a dissolved House. Accordingly, Art. 174(1) does not provide for any period for holding election for constituting fresh legislative Assembly.

Arts. 174 and 324 operate in different fields are not subject to one another.

3. Election Commission is a constitutional body which is an independent and impartial body free from any executive interference. But the powers of the commission are subject to a law made by Parliament or a State Legislature so long as the same does not encroach upon the plenary powers of the Election Commission. The legislative power is subject to the provisions of the constitution.

Conducting of elections is the sole responsibility of the Election Commission. "As a matter of law, the plenary powers of the Election Commission cannot be taken away by law framed by Parliament. If Parliament makes any such law, it would be repugnant to Art. 324."

Thus, Art. 324 "operates in the area left unoccupied by legislation and the words 'superintendence, control, direction' as well as 'conduct of all elections' are the broadest of the terms.'

4. From the various constitutional and statutory provisions, it can be inferred that on premature dissolution of a House, election ought to be held within six months from the date of dissolution of the Assembly.

5. On the premature dissolution of the Assembly, the Election Commission is required to initiate immediate steps for holding election for constituting legisla-

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68. *Supra*, Ch. IV.

69. *Indira Nehru Gandhi v. Raj Narain, supra; T.N. Seshan v. Union of India,* (1995) 5 JT 337 : (1995) 4 SCC 61.

ture assembly on the first occasion and in any case within six months from the date of premature dissolution of the assembly.

Effort should be to hold the election and not to defer holding the election. Only when there is an 'act of God' can the election be postponed beyond six months. But man-made obstructions in the way of elections should be sternly dealt with and should not allowed to defer the election.

6. As regards framing of the schedule for holding the election, the matter lies within the exclusive domain of the Election Commission. This is not subject to any law passed by Parliament.

According to BALAKRISHNAN, J., in a separate concurring opinion, any decision of the Election Commission which is intended to defeat the avowed object of forming an elected Government at the earliest, can be challenged before the Court. If the decision taken by the Commission is perverse, unreasonable or for extraneous reasons and if the decision of the Election Commission is vitiated by any of these grounds, the court can give appropriate direction for the conduct of the election.

The above propositions would apply *mutatis mutandis* to election to Lok Sabha and Art. 85. The Supreme Court's judgement gives some flexibility to frame the time-table to hold election to a prematurely dissolved house. But the over-all time frame for the purpose is six months from the date of dissolution. The Court has emphasized that free and fair elections are the *sine qua* non of democracy which is a basic feature of the Constitution.

E. LEGISLATIVE POWER REGARDING ELECTIONS

Several Articles in the Constitution specifically confer legislative power on Parliament with respect to election matters. Thus, Parliament is empowered to determine by law the manner in which, and the authority by which, each State is to be divided into territorial constituencies after each census for purposes of election to the Lok Sabha [Art. 82],[70] and the State Legislative Assembly [Art. 170(3)].[71]

Parliament may by law regulate any matter relating to the election of the President and the Vice-President subject to the Constitution [Art. 71(3)].[72]

In addition to the above, Parliament may make provisions by law, subject to the provisions of the Constitution, with respect to all matters relating to, or in connection with, elections to either House of Parliament or to the State Legislatures including the preparation of electoral rolls, the delimitation of constituencies, and all other matters necessary for securing the due Constitution of the several Houses [Art. 327]. This provision is reinforced by entry 72 in List I[73] with respect to all matters relating to the elections to either House of Parliament, or to the House or either House of the Legislature of a State subject to the provisions of the Constitution.

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70. *Supra*, Ch. II.
71. *Supra*, Ch. VI.
72. *Supra*, Ch. III.
73. *Supra*, Ch. X, Sec. D.

The supreme legislative power in relation to various elections is thus vested in Parliament but this power is subject to the provisions of the Constitution. Further, subject to the constitutional provisions, and in so far as provision has not been made by Parliament with respect to a matter under Art. 328, a State Legislature may make provision by law with respect to all matters in relation to, or in connection with, the elections to either of its Houses including the preparation of electoral rolls and all matters necessary for securing the due Constitution of such House or Houses. This provision is reinforced by entry 37 in List II.[74]

In pursuance of these constitutional provisions, Parliament has enacted several laws. The Delimitation Commission Act, 1952, provides for the appointment of the Delimitation Commission for making adjustment of seats in, and division of States into territorial constituencies for election to Lok Sabha and State Legislative Assemblies after each census.[75] The Commission is appointed by the Central Government and consists of three members—two sitting or retired Judges of the Supreme Court or High Courts, and the Chief Election Commissioner *ex-officio*. In performance of its duties, the Commission is to be assisted by two to seven associate members for each State drawn from amongst the members of the Lok Sabha representing the State, and the State Legislative Assembly. Every final order of the Commission, after publication in the Gazette of India, becomes final and cannot be called in question in any court.

The Representation of the People Act, 1950, provides for allocation of seats in, and the delimitation of constituencies for the purpose of elections to the Lok Sabha and the State Legislature, the qualifications of voters at such elections, the preparation of electoral rolls, etc.

The Representation of the People Act, 1951, provides for the actual conduct of elections to the Houses of Parliament and to the State Legislatures; the qualifications and disqualifications for membership of those Houses, the corrupt and illegal practices and other election offences and the decision of election disputes. The Act makes detailed provisions in regard to all matters and all stages connected with elections to the various legislatures in the country. The Act is a self-contained enactment so far as elections are concerned, and, therefore, to ascertain the true position in regard to any matter connected with elections, the Act and the rules made thereunder need to be looked into.[76] The Act empowers the Central Government to promulgate rules, after consultation with the Commission, for carrying out the purposes of the Act.

The Presidential and Vice-Presidential Elections Act, 1952, regulates certain matters relating to or connected with elections to the offices of the President and Vice-President of India.[77]

As stated above, the Election Commission has no legislative power, as such, in relation to elections. The Commission can issue directions. In *Lakshmi Charan Sen v. A.K.M. Hussain Ujjaman,*[78] the Supreme Court has observed that the directions issued by the Election Commission to the electoral officers are binding upon such officers but such directions have no force of law so as to create rights

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74. *Supra*, Ch. X, Sec. E.
75. *Supra*, Chs. II and VI.
76. *Ponnuswami N.P. v. Returning Officer,* AIR 1952 SC 64; *supra*, footnote 12.
77. *Supra*, Ch. III.
78. AIR 1985 SC 1233 : (1985) 4 SCC 689.

and liabilities between the contestants of election. The Court has explained the position as follows: There is no provision in any statute which would justify the proposition that the directions given by the Election Commission have the force of law. Election laws are self-contained codes. One must look to them for identifying the rights and obligations of the parties. In the absence of a statutory provision, the directions issued by the Election Commission cannot be equated with law.

The Election Commission is entitled to act *ex debito justitiae*, in the sense that, it can take steps or direct that steps be taken over and above those which it is obligated to take under the law. It can, therefore, issue directions to the Chief Electoral Officers. These directions are binding on those officers, but their violation cannot create rights and obligations unknown to the Election law. "We are of the opinion", said the Court, "that the directions issued by the Election Commission, though binding upon the Chief Electoral Officers, cannot be treated as if they are law, the violation of which could result in the invalidation of the election,[79] either generally, or specifically in the case of an individual."

In *Kanhaiya Prasad Sinha v. Union of India*,[80] the petitioner, a sub-divisional officer, was transferred by the State Government ignoring the direction of the Election Commission. The Patna High Court considering the legal effect of the direction ruled that directions issued by the Election Commission under Art. 324 may be directory or mandatory in nature, but even then they cannot be ignored. The State Government should respect them and implement them. In case the government fails to respect the directions, then the Court may examine the matter and pass appropriate orders.

The Commission has evolved the Model Code of Conduct laying down norms regulating the conduct of political parties, candidates and the various governments during the period of election. But, this code has no legal binding. The code has only moral value although the Commission does point out infractions of the code as and when they occur.

F. ELECTION DISPUTES

Art. 329(*a*) lays down that notwithstanding anything in the Constitution, the validity of any law relating to the delimitation of constituencies, or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or 328 'shall not be called in question in any court.' This provision thus immunizes the law pertaining to the matters mentioned from being questioned in a court on any ground whatsoever.

The words 'notwithstanding anything in the Constitution', make it clear that this clause overrides everything else in the Constitution. Because of Art. 329(*a*), the orders made by the Delimitation Commission regarding delimitation of constituencies and published in the official gazette, could not be agitated in a court of law.[81]

Art. 329(*b*) provides that "notwithstanding anything in the Constitution", no election to either House of Parliament or to a House of a State Legislature "shall be called in question except by an election petition presented to such authority and in

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79. *Ibid.*, at 1242-1243.
80. AIR 1990 Pat 189.
81. *Meghraj Kothari v. Delimitation Commission*, AIR 1967 SC 669 : (1967) 1 SCR 400.

such manner as may be provided for by or under any law made by the appropriate legislature."

This means that a suit or a writ petition would not lie to set aside an election.[82] As the Supreme Court observed in *Durga Shankar*:[83] "The non-obstante clause with which Art. 329 of the Constitution begins…. debars us, as it debars any other court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature."

The policy underlying Art. 329(*b*) is that having regard to the important function discharged by the legislature in a democratic country, all disputes arising out of any election should be postponed till the election is over so as not to dislocate the time schedule for completion of the election and all election disputes should be raised only after the election is over. The term "election" used in Art. 329(b) has a broad connotation. The election process starts with the issue of a notification under the Representation of People Act, 1951, upto the declaration of the result. In between, Art. 329(b) bars any interference by the courts.[84]

The Representation of the People Act. 1951, as it stood before 1956, provided for a system of election tribunals to decide upon disputed elections. That Act did not provide for any judicial review of the decisions of the election tribunals. Parliament endeavoured to clothe the decisions of the election tribunals with the character of non-challengeability. Sec. 105 of the said Act enacted: "Every order of the Tribunal made under this Act shall be final and conclusive." The general approach at this time was to keep the courts out of the area of election disputes. This, it was hoped, would result in expeditious decision of election disputes. But things did not turn out as desired. In course of time, the courts succeeded in extending their supervision over the election tribunals.

The landmark case on the interpretation of Art. 329(*b*) is *Ponnuswami*[85] which bars 'judicial intervention' with the election process. The appellant filed his nomination paper from a constituency for election to the State Assembly. The returning officer rejected his nomination paper on certain grounds. The question was whether the candidate could challenge the decision of the returning officer through a writ petition under Art. 226.[86] The Supreme Court answered in the negative. Keeping in view the phraseology of Art. 329(*b*), the Supreme Court declared that the courts were barred from dealing with any matter arising while the elections were in progress, and till an election petition was disposed of by an election tribunal but not thereafter. The courts would not interfere with the process of election, *i.e.*, from the time the notification is issued till the election petition is disposed of. Any irregularity committed during the course of election could be challenged through an election petition after the election was over.[87]

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82. *Hari Vishnu Kamath v. Ahmad,* AIR 1955 SC 233 : (1955) 1 SCR 1104; *Jagan Nath v. Jaswant,* AIR 1954 SC 210 : 1954 SCR 892; *Krishna Ballabh Prasad Singh v. Sub-Div. Officer Hilsa,* AIR 1985 SC 1746 : (1985) 4 SCC 194.

83. *Durga Shankar Mehta v. Raghuraj Singh,* AIR 1954 SC 520 : (1955) 1 SCR 267.

84. *Election Commission of India v. Ashok Kumar,* (2000) 8 SCC 216 : AIR 2000 SC 2979.

85. *Supra,* footnote 76.

86. For Art. 226, see, Ch. VIII, *supra.*

87. Also, *Hari Vishnu Kamath v. Syed Ahmed Ishaque,* AIR 1955 SC 233 : (1955) 1 SCR 1104; S.*K. Dhara v. Election Comm. of India,* AIR 1973 Cal 184; *Mohinder Singh Gill v. The Chief Election Commissioner,* AIR 1978 SC 851 : (1978) 1 SCC 405; *T.D. Rajalakshmi v. District Election Officer,* AIR 1999 Ker 140.

Art. 329(*b*) is primarily intended to exclude the jurisdiction of all courts in regard to election matters and to lay down the only mode through which an election can be challenged. Any matter which has the effect of vitiating an election should be brought up only at the appropriate stage in an appropriate manner before the election tribunal and should not be brought up at an intermediate stage before any court.

Even if there is any ground relating to the non-compliance with the provisions of the Act and the Constitution on which the validity of any election process could be questioned, the person interested in questioning the election has to wait till the election is over and file an election petition thereafter questioning the election of the successful candidate. In *Ponnuswami*, the Court explained the reason for adopting this stance as follows:

> "It does not require much argument to show that in a country with a democratic Constitution in which the legislatures have to play a very important role, it will lead to serious consequences if the elections are unduly protracted or obstructed".

A legislature in a democratic country performs very important functions. It is, therefore, a matter of first importance that elections should 'be concluded as early as possible according to the time-schedule. It is therefore necessary to postpone all controversies and disputes arising out of the election till after the elections are over so that the election proceedings are not unduly retarded or protracted.[88]

The Supreme Court has laid stress on the *Ponnuswami* proposition, as stated above, from time to time. For example, the Court has observed in *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman.*[89]

> "… 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 power under Art. 226 of the Constitution should pass any orders, interim or otherwise which had the tendency or effect of postponing an election, which is reasonably imminent and in relation to which the writ jurisdiction is invoked. The High Courts must observe a self-imposed limitation on their power to act under Article 226, by refusing to pass orders or give directions which will inevitably result in an indefinite postponement of elections to legislative bodies, which are the very essence of the democratic foundation and functioning of our Constitution".

Non-interference with the process of election is a matter of judicial policy, a matter of self-imposed discipline, and not a matter of judicial powers.

But when once proceedings are instituted in accordance with Art. 329(*b*) by presentation of an election petition, and the election tribunal has decided the matter, the requirements of that Article are fully satisfied. Thereafter when the election petition has been disposed of by the election tribunal, its decision is open to attack in the same manner as the decision of any other tribunal.

The scope of Art. 329(*b*) is limited to initiation of proceedings for setting aside an election and not to any stage after the decision of the tribunal.[90] Beyond the decision of the election tribunal, the ban of Art. 329(*b*) does not bind. Once the

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88. *Ponnuswami*, AIR 1952 SC 64 at 70; *supra*, footnotes 12, 76 and 85.
89. AIR 1985 SC 1233 : (1985) 4 SCC 689.
90. Also see, *Hari Vishnu Kamath, supra*, footnote 87, at 238-239.

election tribunal has decided, the prohibition under Art. 329(*b*) is extinguished and the Supreme Court's overall power to interfere under Art. 136 springs into action.[91] Similarly, a High Court could issue a writ to an election tribunal under Art. 226,[92] as in the case of any other tribunal. This means that, the jurisdiction of the High Courts and that of the Supreme Court starts where the jurisdiction of the election tribunals end, that is, the jurisdiction of the courts starts after an election tribunal has given its decision on the election petition. So long as the poll process is on for election to Parliament or State Assembly, the courts cannot interfere. The only remedy open to the aggrieved party is through an election petition as envisaged by Art. 329(*b*) after the election is over.

The pattern which thus emerged in course of time after the commencement of the Constitution was that an election petition would first be decided by a tribunal; the matter would then invariably come before the High Court through a writ petition, and, lastly, it would come before the Supreme Court by way of appeal under Art. 136.

In effect, a three tier set-up came into being to deal with election matters. This position was recognised in 1956 when the Representation of the People Act, 1951, was amended so as to provide for a regular appeal from an election tribunal to the High Court. An appeal could go thereafter to the Supreme Court under Arts. 132, 133 and 136.[93]

This three tier system usually took a long time to finally decide election disputes. Therefore, the Election Commission recommended that election tribunals be abolished and trial of election petitions be handed over to the High Courts. This was expected to expedite disposal of election disputes as one step would be cut down. Accordingly, in 1966, the jurisdiction to hear and decide an election petition was transferred to the High Court by amending the Representation of the People Act, 1971. The High Court now sits as a statutory tribunal to decide election disputes with appeal to the Supreme Court.

The position now is that there exists a two tier system to decide election disputes. Election Tribunals are no longer appointed now. The election petitions are heard directly by the High Courts[94] from which an appeal may be taken to the Supreme Court under Arts. 132, 133 and 136.

A High Court cannot entertain a writ petition on behalf of a candidate whose nomination paper has been rejected by the returning officer as this is a part of the election process and is covered by Art. 329(*b*). The proper remedy for him is to file an election petition after the completion of the election.[95]

The question of the Election Commission cancelling the poll in a constituency and ordering re-poll therein falls within the process of election. Therefore, a writ petition challenging the decision of the Election Commission is barred by Art. 329(*b*).[96]

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91. *Supra*, Ch. IV.
92. *Supra*, Ch. VIII.
93. *Supra*, Ch. IV.
94. For a commentary on the jurisdiction of the High Courts in trying election petitions see, *H.M. Trivedi v. V.B. Raju*, AIR 1973 SC 2602 : (1974) 3 SCC 415.
Also see, *A.C. Sobhan kuar v. Union of India*, AIR 1984 AP 347.
95. *Ponnuswami, supra*. Also, *In the matter of*: *Sri Subrata Chatterji*, AIR 1983 Cal. 436.
96. *Mohinder Singh Gill v. Election Comm.*, AIR 1978 SC 851 : (1978) 1 SCC 405.

When a person who is incapable of being chosen as a member of the legislature under the Constitution (*e.g.*, he is below the age of 25 years) is elected, his election can be quashed through an election petition.[1] When a person is not qualified to be elected a member, there can be no doubt that the Election Tribunal has got to declare his election to be void. But, suppose, no election petition is filed to challenge his election, can the election be then challenged through a writ petition under Art. 226 ? Such a situation arose in *K. Venkatachalam v. A. Swamickan*.[2]

The appellant was not an elector in the electoral roll for an Assembly constituency for general election. He filed his nomination paper on affidavit impersonating himself as another person of the same name in the electoral roll. Undoubtedly, had an election petition been filed challenging his election, it would have been set aside. But this was not done. An election petition could be filed within the period of limitation set by the relevant statue which was over in the instant case. The Supreme Court was faced with the question whether in these circumstances no remedy was open to the respondent. To refuse a remedy would have meant that a disqualified person would continue to remain a member of the legislature. Art. 193 provides for penalty for sitting and voting when a person is not qualified to be a member of the Assembly.[3] The Supreme Court ruled that, in such a situation, the High Court could, under Art. 226, make a declaration that the appellant is not qualified to be a member of the Assembly. If he is allowed to continue to sit and vote in the Assembly, his action would be a fraud on the Constitution.

The Supreme Court has pointed out in *Venkatachalam* that Art. 226 "is couched in the widest possible term" and unless there is a clear bar to the High Court's jurisdiction under Art. 226, it can be exercised "when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. "Art. 329(b) will not come into play when the case falls under Arts. 191 and 193 and the whole of the election process is over."[4]

Suppose a non-citizen is elected to a House. "Would the Court allow a foreign citizen to sit and vote in the legislative Assembly and not exercise jurisdiction under Art. 226 of the Constitution ?"[5]

Preparation of electoral rolls is anterior to, and not a part of, the election process, and the same may be challenged through a writ petition if provisions of the Constitution or the relevant Act are not complied with.[6]

The Supreme Court has held that, in a suitable case, a challenge to the electoral roll can be mounted on the ground of not complying with the requirements of law subject to the *Ponnuswami* ruling. Preparation and revision of electoral rolls, as such, is not regarded as a part of the process of election within the meaning of Art. 329(*b*). Preparation and revision of electoral rolls is a continuous

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1. *Durga Shankar v. Raghuraj*, AIR 1954 SC 520 : (1955) 1 SCR 267.
2. AIR 1999 SC 1723 : (1999) 4 SCC 526.
3. *Supra*, Ch. VI.
4. *Venkatachalam*, *supra*, footnote 2, at 1734.
5. *Ibid.*
6. *Roop Lal v. Dhan Singh*, AIR 1968 Punj. 1; *S.J. Jhala v. Chief Election Officer*, AIR 1969 Guj. 292; *A.K. Nair v. Elec. Commr.*, AIR 1972 Ker. 5.

process not connected with any particular election. This process goes on, whether there is an election or no election.

But this does not put the existing electoral roll in the cold storage. Election law abhors a vacuum. There is never a moment in the life of a political community when some electoral roll is not in force. When an election is to be held, the electoral roll which exists at the time when election is notified would form the foundation for holding such election. The election of a candidate is not open to challenge on the ground of the electoral roll being defective.[7] The fact that certain claims for inclusion of names in electoral rolls have not finally been disposed of cannot arrest the process of election. The reason is that the holding of elections to the legislature is a matter of paramount importance. On the one hand, it is the statutory right of an individual to vote, but, on the other hand, there is a constitutional obligation to hold election to the legislature.

Art. 329(*b*) bars any challenge to the elections through a writ petition on the ground that the electoral roll on the basis of which the impugned election was held was invalid. Once the final electoral rolls were published and elections held on the basis of such rolls, no one can challenge an election from any constituency on the ground that the electoral rolls were defective.[8]

The Election Commission issued a notification fixing the calendar of events for the purpose of holding the elections to the Legislative Council of Maharashtra. On a writ petition, the High Court issued an interim order staying the holding of the election. On appeal, the Supreme Court ruled in *Shivaji*[9] that, because of the non-obstante clause contained in Art. 329(*b*), the power of the High Court to entertain a petition questioning an election on whatever grounds under Art. 226 is taken away. The word "election" cannotes "the entire process culminating in a candidate being declared elected".

The Supreme Court emphasized that it was not the concern of the High Court under Art. 226 "to rectify any error even if there was an error committed in the process of election at any stage prior to the declaration of the result of the election notwithstanding the fact that the error in question related to a mandatory provision of the statute relating to the conduct of the election." If there was any such error committed in the course of the election process, the Election Commission has the authority to set it right by virtue of the power vested in it under Art. 324. The word 'election' in Art. 329(b) has been used in the wide sense as connoting the entire process culminating in a candidate being declared elected.

An order of the Election Commission cancelling poll, and ordering re-poll, in some polling booths is immune from being challenged through a writ petition because of Art. 329(*b*). It is a step in the election and such a petition amounts to calling in question a step in 'election' and is, therefore, barred by Art. 329(b). "..... Immunity is conferred only if the act impeached is done for the apparent object of furthering a free and fair election and the protective armour drops down

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7. *Lakshmi Charan Sen v. A.K.M. Hassan Uzzaman,* AIR 1985 SC 1233 : (1985) 4 SCC 689; *Indrajit-Barua v. Election Comm. of India,* AIR 1986 SC 103 : (1985) 4 SCC 722.

8. *Kabul Singh v. Kundan Singh,* AIR 1970 SC 340 : (1969) 2 SCC 452; *Indrajit Barua v. Election Comm. of India,* AIR 1986 SC 103 : (1985) 4 SCC 722.

9. *Election Comm. v. Shivaji,* AIR 1988 SC 61 : (1988) 1 SCC 277.
Also see, *T.D. Rajalakshmi v. District Election Officer,* AIR 1999 Ker 140; *Mullapally Ramachandran v. District Collector, Kannaur,* AIR 2000 Ker 15.

if the act challenged is either unrelated to or thwarts or taints the course of the election."[10]

In February, 1982, on a writ petition being filed under Art. 226, the Calcutta High Court issued an interim injunction on the Election Commission restraining it from declaring a date for holding State Assembly elections in West Bengal. The petition pointed out certain irregularities in the preparation of the electoral rolls and sought a stay of their publication. Certain questions about the *vires* of the laws of election were also raised. This created a sort of crisis for the term of the legislature was due to expire on June 24, 1982, and the Left Front Government in power wanted to complete the elections in March itself.

In an unprecedented move, the Supreme Court agreed to hear an appeal under Art. 136 and transfer the petition to itself for disposal on merits. Dismissing the petition, the Court agreed that in spite of Art. 329(*b*), the *vires* of the laws of election could be challenged through a writ petition. But the Court emphasized that no High Court in the exercise of its powers under Art. 226 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. The more imminent an election, the greater ought to be the reluctance of the High Court to take any step which will postpone the electoral process.[11]

The Election Commission in exercise of its powers under Art. 324 issued a direction relating to the employment of the electronic machines for the recording of votes in some polling booths in a constituency in Kerala. A candidate challenged this system of recording votes through a writ petition, but in *K.C.Mathew v. Election Commissioner,*[12] the Kerala High Court rejected the petition on the ground that it was barred by Art. 329(*b*).

This decision does not appear to be sound. It is stretching Art. 329(b) a little too much. It should also not be forgotten that judicial review has been declared to be a basic feature of the Constitution and that Art. 329(b) needs to be interpreted in the light of this declaration.[13] The question raised here concerned the legal validity of an order made by the Election Commission. Whether the order in question was within or without the authority of the Commission? Such a challenge ought not to be held barred by Art. 329. At present, no clause excluding jurisdiction of the courts is ever interpreted so as to bar a challenge to an order of an authority on the ground of *ultra vires* or jurisdictional error.[14]

But after the election, the matter was agitated again, and the Supreme Court quashed the order of the Election Commission as well as the election held through electronic machines[15]

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10. *Mohinder Singh, supra,* footnote 96, at 868.

11. *A.K.M. Hassan Uzzaman v. Union of India*, (1982) 2 SCC 218.
Also, *Election Commission v. State of Haryana*, AIR 1984 SC 1406 : 1984 Supp SCC 104.

12. AIR 1982 Ker 265.
Also, *supra*,

13. See, *infra*, Ch. XLI.

14. *Anisminic Ltd. Foreign Compensation Comm.*, (1967) 3 WLR 382.
For full discussion on this point, see, Jain, *A TREATISE ON ADM. LAW*, Vol. II.

15. *Jose v. Sivam, supra*, footnote 39.

The Supreme Court has restated its somewhat modified view on the maintenance of writ petitions. In *Election Commission of India v. Ashok Kumar*,[16] the Supreme Court has stated:

> "Any thing done towards completing or in furtherance of the election proceedings cannot be described as questioning the election…
>
> "Without interrupting, obstruction or delaying the progress of the election proceedings, judicial intervention is available if assistance of the court has been sought merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the court…."

In the instant case, an order passed by the Election Commission regarding the manner of counting of votes was challenged as *mala fide*. The High Court passed an interim order staying the order of the Election Commission. On appeal, the Supreme Court stayed the High Court order and thus counting of votes took place as per the order of the Election commission. Clarifying the position, the Supreme Court stated that although the High Court order did not have the effect of "retarding, protracting, delaying or stalling the counting of votes or the progress of the election proceedings", yet the order ought not to have been made by the High Court because in the petition there was merely "a bald assertion of *mala fides*," "a mere *ipse dixit*" of the petitioner. "From such bald assertion an inference as to *mala fides* could not have been drawn even *prima facie*".

The lesson from the above case is that the Supreme Court has not faulted the High Court on the ground that it ought not to have made the order because of Art. 329(b). What the Supreme Court has said is that *on merits*, the order of the High Court was wrong.

Art. 329(*b*) by its terms does not bar writ petitions under Art. 226 to challenge elections to bodies other than Parliament and State Legislatures, as for example, municipal elections. But there is Art. 243-O which is similar to 329(b).[17] The remedy under Art. 226 cannot be taken away by any law. However, the remedy under Art. 226 is discretionary with the High Court and it may refuse to entertain a writ petition if an alternative, efficacious remedy is provided by law,[18] or if the effect thereof would be to delay elections.[19]

G. PARTY SYSTEM

Originally, the Constitution made no reference to the party system, as such. In course of time, however, the party system has come to be recognised formally as being essential for the running of the Parliamentary democratic system.

The Supreme Court has dilated upon the significance of the party system in several cases. For example, in *Rama Kant Pandey v. Union of India*,[20] the Court

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16. (2000) 8 SCC 216, at 232 : AIR 2000 SC 2979.

17. *Supra*, Ch. IX, Sec. H.
Also see, *State Election Commissioner v. State of Bihar*, AIR 2001 Pat 192.

18. *Mahaveer Singh v. Raghunath*, AIR 1983 NOC 220 (Raj); *Navuba Gokalji v. Returning Officer*, AIR 1982 Guj. 281; *Aminchand v. State of Punjab*, AIR 1983 P&H 90.

19. *Anugrah Narain Singh v. State of Uttar Pradesh*, (1996) 6 SCC 303 : (1996) 8 JT 733; *Boddula Krishnaish v. State Election Commissioner*, (1996) 3 SCC 416 at 418-422 : AIR 1996 SC 1595.

20. AIR 1993 SC 1766, 1768 : (1993) 2 SCC 438.

has pointed out that the Cabinet system adopted in India is based on the British pattern.[21] For a strong vibrant democratic government, it is necessary to have a parliamentary system which involves a majority as well as a minority so that there may be a full-fledged debate on controversial issues on the floor of the House. This is best achieved through the party system. "To abolish or ignore the party system would be to permit a chorus of discordant notes to replace an organised discussion." "It is, therefore, idle to suggest that for establishing a true democratic society, the party system should be ignored".[22]

In the instant case, the Court upheld a provision providing for countermanding of an election if any party candidate died but not when an independent candidate died. The Court ruled that the differential treatment accorded by law to party candidates does not fall foul of Art. 14.[23] The Court rejected the contention that the candidates set up by political parties should not receive any special treatment. The Court ruled that the candidates set up by political parties constitute a class by themselves.

Earlier in *Thampy*,[24] the Supreme Court had upheld a provision according to which a political party can spend, can incur expenses, without any limit, in support of a candidate as not being inconsistent with Art. 14. The Court stated in this connection:

> "It is the political parties which sponsor candidates, that are in a position to incur large election expenses…We do not consider that preferring political parties for exclusion from the sweep of monetary limits on election expenses, is so unreasonable, or arbitrary as to justify the preference being struck down upon that ground."

The Court explained the role of political parties thus: in any democratic system of government, political parties occupy a distinct and unique place. It is through them that the generality of people attempt to voice and ventilate their grievances. "Considering also, the power which they wield in the administration of government affairs, a special conferment of benefits on them in the matter of modalities governing the election process cannot be regarded as unreasonable or arbitrary".[25]

In *Agarwal*,[26] the Supreme Court has taken note of, and emphasized upon, the vital role played by the political parties in a parliamentary system in the following words:

> "In Parliamentary form of democracy political parties play vital role and occasionally they sponsor candidates of the election".

To strengthen the party system, the Court has even suggested the need for discouraging independent candidates from contesting elections because it causes unnecessary confusion to the voters.

The Election Symbols (Reservation & Allotment) Order, 1968, is also a step in the direction of recognising the party system.[27] While upholding the validity of the symbols order, the Court observed in *Kanhaiya Lal Omar v. R.K. Trivedi*,[28]

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21. *Supra*, Ch. III, Sec. B(c).
22. AIR 1993 SC at 1769.
23. See, *infra*, Ch. XXI.
24. *P. Nalla Thampy v. Union of India*, AIR 1985 SC 1133 : 1985 Supp SCC 189.
25. *Ibid.*, at 1140.
26. *Dhartipakar Madan Lal Agarwal v. Rajiv Gandhi*, AIR 1987 SC 1577 : 1987 Supp SCC 93.
27. *Supra.*

> "It is true that till recently, the Constitution did not expressly refer to the existence of political parties. But their existence is implicit in the nature of democratic form of government which our country has adopted…..The political parties have to be there if the present system of government is to succeed."

The Anti-Defection Law introduced in 1985 through the X Schedule to the Constitution is also an attempt to strengthen the party by discouraging defections from one party to another.[29]

The Constitution thus formally recognises the party system as an essential limb of the constitutional process in the country.

The *Representation of the People (Amendment) Ordinance, 2000.*

Reference has been made earlier to criminalisation of politics[30] and the ruling of the Supreme Court in *Union of India v. Association for Democratic Reforms.*[31] To dilute the impact of the court order, the Central Government has now promulgated the above ordinance making certain amendments to the Representation of the People Act, 1951.

A candidate for election to a House of Parliament/State legislature is now required to furnish information on the following two points:

(i) whether he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction;

(ii) he has been convicted of an offence and sentenced to imprisonment for one year or more.

The candidate is not required to give any other information as was desired by the Supreme Court.

As regards declaration of assets and liabilities, same is to be made by an elected member to the presiding officer of the concerned House.

The ordinance then adds the following section as S. 33B to the RPA:

> "Notwithstanding anything contained in any judgment, decree or order of any court or any direction, order or any other instruction issued by the Election Commission, no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to be disclosed or furnished under this Act or the rules made thereunder".

While the ordinance takes a small step towards decriminalisation of politics, it is a flawed piece of legislation on more than one ground. It is an example as to how politicians of different shades and hues who shout hoarse day in, day out

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28. AIR 1986 SC 111, 116 : (1985) 4 SCC 628.

29. See, *supra*, Ch. II, Sec. F.

30. *Supra*, Ch. III, Sec. D(ii)(d).

31. In a commendable statement, the President of the Congress Party strongly condemned the Government's move "to wilfully pass an ordinance that defies (1) the will of a vast majority of the people, (2) the letter and spirit of the order of the Supreme Court and (3) the basic tenet of transparency and accountability in politics.

The Congress has expressed concurrence with the orders of the Supreme Court that candidates must disclose information regarding convictions and charges for offences, assets and bank balances and liabilities and overdues. Such information must be disclosed by all candidates at the time of filing nomination and prior to an election.

The Times of India, dated Aug. 28, 2002, p. 13.

condemning criminalisation of politics, come together forgetting all their ideological differences to protect their turf. The Supreme Court had not made any radical suggestion but even these suggestions are not acceptable to the politicians. This shows that there exists a wide gulf between preaching and practice in to-days political arena. The ordinance seeks to draw a veil of secrecy over the acts of the politicians and thus it lacks transparency.

It is also anti-democratic as it directly strikes at the people's right to know—a democratic right. The newly added S. 33B seeks to deny to the people the right to be informed about the credentials of the candidates for whom they are prompted to vote. Can it be said that it promotes free and fair elections in the country?

Above all the constitutional validity of S. 33B is extremely suspect. The Supreme Court has spelt out the right to know from the freedom of speech and expression couched in Art. 19(1)(a) which is a Fundamental Right. Therefore, right to information is itself a Fundamental Right. S. 33B directly seeks to nullify this right. It is like saying that no one has freedom of speech outside the statute. Therefore, it is hard to hold S. 33B as valid. No law, not falling within the parameters of Art. 19(2) can deny in any way the right guaranteed by Art. 19(1)(a). By no stretch of imagination S. 33B falls within the scope of Art. 19(2).

The ordinance has to be approved by Parliament, but it is doubtful if it will be approved in its present form because the Congress Party, which has a majority in the Rajya Sabha has expressed reservation about the Ordinance in its present form.[32]

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