



Policy, Practice and Power: Evaluating the operations of Election Commission of India and its lessons for SDG 16

Vedant Bharadwaj^{1*}, Debabrata Baral²

^{1*}Research Scholar, School of Law, Bennett University, Greater Noida, UP – 201310. Email ID: advvedant@gmail.com

²Associate Professor of Sociology, School of Law, Bennett University, Greater Noida, UP – 201310. Email ID: Debabrata.baral@gmail.com

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ARTICLE INFO ABSTRACT

This Article is an attempt to understand the ambiguity in the constitutional status of the Election Commission of India, when it exercises its constitutionally conferred power under Art. 324 of the Constitution of India. Although Art. 324 prescribes very broad powers, the Constitutional Courts have not clearly laid out the outer limit of the exercise of such powers thereby resulting in the ambiguous constitutional status. The very first ambiguity is over the test to determine if the ECI can exercise its constitutional power for a given instance. Two different decisions delivered by Supreme Court's Three Judge Bench have recognised different tests for the aforesaid purpose. It is not clear on whether the authoritative test will be followed for future instances. The second ambiguity is over the ECI's exercise of powers under the Symbols Order, 1968 that has been brought out by the ECI itself. The third ambiguity is over the adjudicatory powers that have been accorded to the ECI in certain specified matters. The fourth ambiguity is over the requisite assistance that can be claimed by the ECI for proper exercise of its powers under Art. 324(6) of the Constitution. The fifth ambiguity is over the legal tenability of an amendment made by the ECI to its own 1968 Symbols Order. This article is based on primary literature e.g., constitutional provisions, election symbols order 1968, the conduct of election rules 1961, reported judgments of Supreme Court of India and Central Statutes i.e. Armed Forces (Special Powers) Act 1958, The Disaster Management Act 2005. This article will contribute to the discussion on SDG 16 i.e., in creation of strong institution and in providing justice for everyone.

KEYWORDS: Constitutional Law, Public Policy, Ambiguity, Ambiguous functioning, Elections, Election Commission of India, Democracy, Constitutional Governance, Constitutional Administration, Constitutional Accountability

INTRODUCTION:

The Election Commission of India (hereinafter referred to as ECI) is an autonomous constitutional body that has been entrusted with the task of administering elections in India, with the authorisation being conferred under Art. 324 of the Constitution. ECI came into existence alongside the coming in of the Constitution on 25.01.1950. Instead of exhaustively defining the ambit of powers of ECI, the Constitution has left the overall superintendence and control of elections to ECI. This broad conferment of powers allows the ECI to come up with the necessary measures to regulate elections, including the issuance of the Election Symbols Order. Initially the ECI was manned by one person at the helm (being the Chief Election Commissioner), but in recent times it consists of three persons (One Chief Election Commissioner alongside two Election Commissioners) thereby making the decision-making process contingent on majority view of the Commission. The Election Commission of India has been granted very broad powers to conduct elections in India by Art. 324 of the Constitution of India¹. The express powers conferred through Art. 324 on ECI are: -

- (i) Superintendence, direction and control of elections to the Parliament²;
- (ii) Superintendence, direction and control of elections to the State Legislatures³;

¹ INDIA CONST. art. 324.

² Supra note 1.

³ Supra note 1.

- (iii) Superintendence, direction and control of elections to the offices of President and Vice-President of India⁴;
- (iv) Preparation of electoral rolls for the three categories of elections discussed above⁵;
- (v) Request the President or Governor to make available the necessary staff for proper discharge of its functions⁶.

While the express constitutional provision of Art. 324 provides very broad and expansive powers to the Election Commission (in the conduct of elections)⁷, there is the question of implementing such powers in the presence of already existing codified laws. This specific question was delved into by the Supreme Court in *Kanhaiya Lal's Case*⁸ in the context of ECI's power to create the Election Symbols Order, 1968⁹. It was argued before the Supreme Court that ECI had no power to create and enforce the Elections Symbols Order, 1968 as the said order was of legislative character which the ECI was not authorized under any specific law to create¹⁰. The Court has held that ECI's power to regulate elections will include the power to regulate those aspects which are not dealt with by any existing codified law under Articles 327 & 328 of the Constitution¹¹. It is further clarified by the Court that the ECI's power under Art. 324 comes into play only in the situation of a subject matter not being covered within the ambit of some legislation¹². This finding on applicability of ECI's Art. 324 power in situations of legislative vacuum was justified on the basis of two prior Apex Court precedents¹³. It appears that the reasoning of ECI's Art. 324 constitutional power to apply in cases of legislative vacuum has been used to justify the legal validity of the Election Symbols Order, 1968 issued by ECI¹⁴. Therefore, it can be concluded that ECI gains the authorisation to use its Art. 324 power only when some codified law is not dealing with that subject matter.

But we find an interesting finding at para 17 of the decision¹⁵. It is stated here that some authorities in India operate in a grey area as they are empowered to lay down binding rules of conduct, even though such rules of conduct are not a 'law' in the jurisprudential sense¹⁶. But nevertheless, it is clarified that ECI's directions remain valid, irrespective of it coming through a general order (to a designated class of persons) or a special order (to a specific individual)¹⁷.

I ECI AND ITS CONSTITUTIONAL POWER: MAPPING THE AMBIGUITY

It is pertinent to note that the test to be followed by ECI for invoking its Art. 324 Constitutional power has undergone a slight modification in *Ashok Kumar's Case*¹⁸. The Court holds that such Art. 324 power is to be

⁴ Supra note 1.

⁵ Supra note 1.

⁶ Supra note 1.

⁷ Supra note 1.

⁸ *Kanhaiya Lal Omar v. R.K. Trivedi*, (1985) 4 S.C.C. 428 (Supreme Court – 2 Judges).

⁹ Election Symbols (Reservation and Allotment) Order, 1968.

¹⁰ Supra note 8 para 1.

¹¹ Supra note 8 para 9.

¹² Supra note 8 para 16.

¹³ *Mohinder Singh Gill v. Chief Election Commissioner*, (1978) 1 S.C.C. 405 [Constitution Bench – 5 Judges]; *A.C. Jose v. Sivan Pillai*, (1984) 2 S.C.C. 656 [Supreme Court – 3 Judge Bench].

¹⁴ Supra note 8 paras 13 and 16.

¹⁵ Supra note 8 para 17.

¹⁶ Supra note 8 para 17.

¹⁷ Supra note 8 para 17.

¹⁸ *Election Commission of India v. Ashok Kumar*, (2000) 8 S.C.C. 216 at paras 12, 29 and 32(3).

Relevant extract of para 13 of the judgment is quoted below: -

"13. ... The words "superintendence, direction and control" have a wide connotation so as to include therein such powers which though not specifically provided for but are necessary to be exercised for effectively accomplishing the task of holding the elections to their completion."

Relevant extract of para 29 of the judgment is quoted below: -

"29. Section 100 of the Representation of the People Act, 1951 needs to be read with Article 329(b), the former being a product of the latter... Sub-clause (iv) of clause (d) of sub-section (1) of Section 100 is a "residual catch-all clause". Whenever there has been non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951 or of any Rules or Orders made thereunder if not specifically covered by any other preceding clause or sub-clause of the section it shall be covered by sub-clause (iv). The result of the election insofar as it concerns a returned candidate shall be set aside for any such non-compliance as the aforesaid subject to such non-compliance, also satisfying the requirement of the result of the election having been shown to have been materially affected insofar as a returned candidate is concerned."

used for instances when no specific legal authorisation is conferred by codified law, but exercise of such power is necessitated for the purpose of completing the election process¹⁹. But this test²⁰ slightly differs from the previously propounded test²¹. The previous test for invoking Art. 324 constitutional power included the satisfaction of 2 essential ingredients: - (i) It is necessary for ECI to use such power to ensure smooth conduct of elections²² and (ii) Exercise of such power is not affected by any codified law made in the domain of Arts. 327 and 328 of the Constitution²³. The subsequent test for invoking Art. 324 constitutional power includes the satisfaction of the following 2 essential ingredients: - (i) It is necessary to complete the election process²⁴; and (ii) No specific power provided by law to the ECI in that regard²⁵.

But the subsequent decision of allowing ECI to exercise its constitutional power in the absence of provision of specific power to ECI in that aspect²⁶ may lead to some problematic consequences. This can be illustrated through a thought experiment. Let's say that a particular subject matter is governed by the Representation of People Act, 1951 and a Court hearing a challenge in one election petition can determine some issues²⁷. If the aforesaid finding is strictly followed, then the ECI can attain the power of conclusively determining some factual issues even when it expressly falls in the domain of the Court hearing the election petition, and the same would be justified on the reasoning that ECI has not been given a specific power in this regard. Such an interpretation will lead to curtailment of High Court's power in determining factual issues in an election petition. It should be noted that ECI's exercise of Art. 324 constitutional power to go against applicable statutory mandate has been expressly rejected by a Three Judge Bench of Supreme Court in A.C. Jose Case²⁸. The Supreme Court has authoritatively held that ECI's Art. 324 constitutional power will be enforced in the following manner: - (i) It can be used when the Parliamentary Law or rule made thereunder does not exist²⁹; (ii) It will be used when a codified law (Act or Rules thereunder) does exist, but such law is silent on some subject matter³⁰; (iii) It will not be used to contravene any existing Act or Rules with the reasoning being based on the idea that such power supplements the law (to fill such legislative vacuum) and not to supplant the law³¹; (iv) It will not be used to circumvent the requirement of statutory rules that require

Relevant extract of para 32(3) of the judgment is quoted below: -

"(3). Subject to the above, the action taken or orders issued by the Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law."

¹⁹ Supra note 18 para 13.

²⁰ Supra note 18 para 13.

²¹ Supra note 8 para 9.

²² Supra note 8 para 9.

²³ Supra note 8 para 9.

²⁴ Supra note 18 para 13.

²⁵ Supra note 18 para 13.

²⁶ Supra note 18 para 13.

²⁷ Representation of the People Act, 1951, No. 43, Act of Parliament (India).

²⁸ A.C. Jose v. Sivan Pillai, (1984) 2 S.C.C. 656 at para 7 and 25 [Supreme Court – 3 Judge Bench].

Relevant extract of para 7 of the judgment is quoted below: -

"7. ...The Commission in the garb of passing orders for regulating the conduct of elections cannot take upon itself a purely legislative activity which has been reserved under the scheme of the Constitution only to Parliament and the State Legislatures. By no standards can it be said that the Commission is a third Chamber in the legislative process within the scheme of the Constitution. Merely being a creature of the Constitution will not give it plenary and absolute power to legislate as it likes without reference to the law enacted by the legislatures."

Relevant extract of para 25 of the judgment is quoted below: -

"25. To sum up, therefore, the legal and constitutional position is as follows:

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

(b) When there is an Act or express Rules made thereunder, it is not open to the Commission to override the Act or the Rules and pass orders in direct disobedience to the mandate contained in the Act or the Rules. In other words, the powers of the Commission are meant to supplement rather than supplant the law (both statute and Rules) in the matter of superintendence, direction and control as provided by Article 324,

(c) Where the Act or the Rules are silent, the Commission has no doubt plenary powers under Article 324 to give any direction in respect of the conduct of the election, and

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

²⁹ Supra note 28 para 25.

³⁰ Supra note 28 para 25.

³¹ Supra note 28 para 25.

ECI's direction to get approval of Central Government before enforcement of such direction³². At this stage it should be noted that though both decisions have been given by Three Judge Benches of the Supreme Court, yet they have not been overruled by a Larger Bench till date³³. The interpretation and findings of A.C. Jose case should be deemed to have laid down the correct position of law³⁴, as it delved into detail the question of whether ECI can function beyond the statutory mandate governing the conduct of elections³⁵.

We must take note of a very pertinent finding and reasoning at para 7 of the judgment³⁶. Here the Court has held that ECI may be a constitutional body, but it cannot take over the legislative power of Parliament in the Indian constitutional framework³⁷. The status of being a constitutional body does not give any authorisation to assume parity (in legislative domain) at par with the Parliament³⁸. This would mean that any body or authority (including one established by the Constitution) cannot subsume legislative powers at par with Parliament, and override Parliamentary Enactments at will.

II

ECI AND ITS AMBIT OF ECI'S POWERS UNDER THE ELECTION SYMBOLS ORDER, 1968

Now we come to the issue of the Symbols Order, 1968³⁹ granting authorisation to ECI to decide disputes even beyond the aspect of Election Symbols. Paragraph 15 of this order states the Commission can now decide which group or faction of a recognised political party will be considered the recognised political party after the occurrence of creation of rival factions within it⁴⁰. But it should be noted that paragraph 15 does not authorise the ECI to decide only the issue of election symbols on account of factionalism in the party leading to a split, but enables the determination of legal identity of split groups even when the issue of election symbols is not involved⁴¹. It is argued that the Commission cannot determine the legal identity of rival factions of a political party following a split under the Election Symbols Order, if the issue of Election Symbols is not involved. The Election Symbols Order should only contain directions in connection to the aspect of election symbols alone, and not matters which are independent of it. Paragraph 16 of the Symbols Order deals with the Commission's power to recognise the legal identity in instances of amalgamation of two or more political parties⁴². It is argued that even this power attained by ECI to determine the legal identity of amalgamation of political parties is outside the scope of the Symbols Order, as the issues are to be decided when no dispute relating to election symbol is present. It is argued that ECI cannot amend the Symbols Order to attain jurisdiction in matters where issues relating to election symbols are not existing and the same would have to be treated as ultra vires. At this stage we should note that Paragraph 16-A of the Symbols Order allows the Commission to suspend/withdraw the recognition of a political party on aspects not involving election symbols in any manner⁴³. The penalties of suspension/withdrawal of recognition of a political party can be imposed by the Commission under Paragraph 16-A in the following instances⁴⁴: - (i) non-Compliance with the Model Code of Conduct⁴⁵; (ii) non-compliance with the directions/instructions of ECI which are necessary to achieving the object of fair, free and peaceful elections⁴⁶; (iii) any defiance in respect of the above two aspects⁴⁷.

Therefore, it becomes clear that the grounds for imposition of penalty of suspension/withdrawal of recognition of political party is not based on election symbols, and therefore Paragraph 16-A would also appear to be ultra vires the subject matter of regulation of election symbols, and therefore cannot be included in the Election Symbols Order. Therefore, it is argued that the insertion of Paragraph 16-A⁴⁸ would be deemed invalid.

III

ENCROACHING UPON SPEAKERS' JURISDICTIONS:

³² Supra note 28 para 25.

³³ Supra note 18 and note 28.

³⁴ Supra note 28 para 25.

³⁵ Supra note 28.

³⁶ Supra note 28 para 7.

³⁷ Supra note 28 para 7.

³⁸ Supra note 28 para 7.

³⁹ Supra note 9.

⁴⁰ Supra note 9 para 15.

⁴¹ Supra note 9 para 15.

⁴² Supra note 9 para 16.

⁴³ Supra note 9 para 16-A.

⁴⁴ Supra note 9 para 16-A. Paragraph 16-A was inserted into the Election Symbols Order, 1968 by way of Notification O.N. 42[E], dated 18-2-1994.

⁴⁵ Supra note 9 para 16-A.

⁴⁶ Supra note 9 para 16-A.

⁴⁷ Supra note 9 para 16-A.

⁴⁸ Supra note 9 para 16-A.

MAPPING THE ADJUDICATORY MECHANISM OF ECI UNDER THE ELECTION SYMBOLS ORDER, 1968

As discussed before Paragraph 15 of Symbols Order permits the Commission to determine the legal validity of rival factions within a political party⁴⁹. Paragraph 16 allows the Commission to determine whether a merger of political parties leading to creation of a new party has identity of a recognised National Party or State Party, and consequently allot the election symbol to it⁵⁰. Barring the second part of Paragraph 16 (of allotting an election symbol to the newly merged party), the rest of Paragraphs 15 & 16 of the Symbols Order intrudes into the domain of Speaker's jurisdiction in defection matters under the Constitution's Tenth Schedule⁵¹.

Since the Constitution's Tenth Schedule authorises the Speaker (or the Chairman as the case may be) to decide on questions arising out of split or merger of a political party⁵², the ECI can no longer determine such matters. The Speaker (or Chairman) has the jurisdiction to decide on issues of disqualification due to defection for a member of the House under Paragraph 6⁵³ in respect of the below mentioned grounds: - (i) Member has voluntarily given up the membership of the political party⁵⁴; (ii) Member votes or abstains to vote, and this is done contrary to the direction of the political party he belongs to⁵⁵. However, such behavior ceases to be a basis for disqualification if condoned by the political party within 15 days of the impugned action⁵⁶; (iii) Member elected as an independent candidate but joins a political party post the winning of the election⁵⁷; (iv) Nominated member (seat obtained not through direct election) joins a political party after 6 months of gaining membership⁵⁸.

But the Tenth Schedule provides for 3 exceptions to the grounds of defection⁵⁹ of which one exception stands deleted. They are as follows: - (i) The member has participated in a split within the political party, wherein the split faction consists of at least 1/3rd members of the original political party⁶⁰; (ii) The member has participated in a split and consequent merger with another political party, wherein the split faction of the original party consists of at least 2/3rd members of the original political party now merging with another political party⁶¹; (iii) The member has become a Speaker/Deputy Speaker/Chairman/Deputy Chairman in the House (Parliament or State Legislative Assembly as the case may be)⁶². But it should be noted that the first exception of split of 1/3rd members within a political party stands removed by a constitutional amendment⁶³, and is therefore no longer available as a defense.

The aforesaid discussion thereby makes it clear that pursuant to Constitution's Tenth Schedule, the Speaker has express constitutional authorisation to decide on matters of splits or mergers involving the factions within a political party. It should be noted that the entirety of Tenth Schedule does not contain an exception to preserve ECI's power to decide on splits and mergers under Paragraph 15 & 16 of the 1968 Symbols Order.

Let's discuss a thought experiment how permitting the ECI to retain its jurisdiction under Paragraphs 15 & 16 of the 1968 Symbols Order can lead to questionable results qua the Tenth Schedule. Suppose a political party witnesses a split wherein a faction of 40% of its members decided to leave the original party, and form a new political party of their own. As per Tenth Schedule Paragraph 2(1)(a) read with Paragraph 3 (now deleted), this split faction stands automatically disqualified by the Speaker. But say the ECI decides to grant this split faction the right to use the name and symbol of the original political party. This would lead to a questionable result, where the disqualified faction of a political party that has even lost the elected seats now gain the identity (name and symbol) of the original political party. Building on the above thought experiment, let's assume that ECI's decision to grant the identity (name and symbol) of the original political party to the split faction of 40% members is upheld. What then happens to the original political party and its members? Do they remain in power but lose their collective identity of a political party? Will the loss of identity of the original political party mean that non-disqualified successful candidates suddenly become independent candidates? Will the loss of identity of the original political party mean the automatic elimination of party whip? Will the non-disqualified

⁴⁹ Supra note 9 para 15.

⁵⁰ Supra note 9 para 16.

⁵¹ INDIA CONST. Tenth Schedule.

⁵² Supra note 51 paragraph 6.

⁵³ Supra note 51 paragraph 6.

⁵⁴ Supra note 51 paragraph 2(1)(a).

⁵⁵ Supra note 51 paragraph 2(1)(b).

⁵⁶ Supra note 51 paragraph 2(1)(b).

⁵⁷ Supra note 51 paragraph 2(2).

⁵⁸ Supra note 51 paragraph 2(3).

⁵⁹ Supra note 51.

⁶⁰ Supra note 51 paragraph 3.

⁶¹ Supra note 51 paragraph 4.

⁶² Supra note 51 paragraph 5.

⁶³ Paragraph 3 of Tenth Schedule of Constitution stands omitted by the Constitution (Ninety-First Amendment) Act, 2003, section 5(c) (w.e.f. 1-1-2004).

successful candidates have to create a new political party and join such party from back date to avoid fresh disqualification under Tenth Schedule Paragraph 2 Explanation (2)?

The only way to reconcile the operational effect of both the Tenth Schedule of Constitution and Paragraphs 15 & 16 is to have differential domains. Since the Tenth Schedule was inserted in 1985⁶⁴ (much later than the 1968 Symbols Order), it can be said that ECI could have decided on issues of splits and mergers within a political party upto 1-3-1985, after which only the Speaker (or Chairman as the case may be) retains the jurisdiction to decide on such issues under Tenth Schedule Paragraph 6 of the Constitution. Therefore, it is argued that Paragraphs 15 & 16 of the 1968 Symbols Order stand impliedly repealed by the Constitution's Tenth Schedule.

IV THE 'RIGHT' TO ASSISTANCE

The ECI has been given the power to request the President or Governor for requisite staff to aid its functioning under Art. 324(1) of the Constitution⁶⁵. This question finds mention in the Tamil Nadu Case⁶⁶. Here we find that the Union Government did not agree with the Commission's directions for deployment of security forces to conduct elections⁶⁷. The Court has not held the Commission's directions in this regard to be binding, and instead left the determination of such issues to be resolved by a mutually acceptable mechanism in future instances⁶⁸. Therefore, it remains unclear on what is the determination standard for requisite assistance under Art. 324(6). It is also not clear which authority is to make the determination on the nature and numbers in respect of the assistance so required.

We have to discuss the Constitution Bench discussion in the 2002 Presidential Reference⁶⁹ to understand the ambit of such uncertainty in law. The majority decision consists of judgment given by V.N. Khare, J. (for Kirpal, C.J., himself and Bhan, J.) with concurring opinion of Balakrishnan, J. and Arijit Pasayat,

⁶⁴ INDIA CONST. Tenth Schedule. Constitution's Tenth Schedule was inserted by Constitution (52nd Amendment) Act, 1985, section 6 (w.e.f. 1-3-1985).

⁶⁵ INDIA CONST. art. 324(6).

⁶⁶ Election Commission of India v. State of Tamil Nadu, 1995 Supp (3) S.C.C. 379 at paras 4 and 5 (Supreme Court – 2 Judges).

⁶⁷ Supra note 66 para 4.

⁶⁸ Supra note 66 para 5.

⁶⁹ In the matter of Special Reference No. 1 of 2002 (Gujarat Assembly Election Matter), (2002) 8 S.C.C. 237 at paras 1, 84, 105, 106 and 161 [Constitution Bench – 5 Judges].

Relevant extract of the third question of the Presidential Reference posed before the Supreme Court at para 1 of the judgment is quoted below: -

“(iii) Is the Election Commission of India under a duty to carry out the mandate of Article 174 of the Constitution, by drawing upon all the requisite resources of the Union and the State to ensure free and fair elections?”

Relevant extract of majority opinion at para 84 of the judgment is quoted below: -

“(iii) ... Under Article 324, it is the duty and responsibility of the Election Commission to hold free and fair elections at the earliest. No efforts should be spared by the Election Commission to hold timely elections. Ordinary, law and order or public disorder should not be occasion for postponing the elections and it would be the duty and responsibility of all concerned to render all assistance, cooperation and aid to the Election Commission for holding free and fair elections.”

Relevant extract of concurring opinion of K.G. Balakrishnan, J. at paras 105 and 106 of the judgment is quoted below: -

“105. ... There may be a situation where the Election Commission may not be in a position to conduct free and fair election because of certain natural calamities. Even under such situation the Election Commission shall endeavour to conduct election at the earliest making use of all the resources within its command. Ample powers are given to the Election Commission to coordinate all actions with the help of various departments of the Government including military and paramilitary forces.”

“106. ... If there is any impediment in conducting free and fair election as per the schedule envisaged by the Election Commission, it can draw upon all the requisite resources of the Union and the State within its command to ensure free and fair election, though Article 174 has no application in the discharge of such constitutional obligation by the Election Commission. It is the duty of the Election Commission to see that the election is done in a free and fair manner to keep the democratic form of government vibrant and active.”

Relevant extract of concurring opinion of Dr. Arijit Pasayat, J. at para 161 of the judgment is quoted below: -

“161. ...3. As article 174 does not deal with election, the question of the Election Commissioner taking the aid, assistance or cooperation of the Centre or the State Governments to draw upon their resources to hold the election does not arise. On the contrary for effective operation of Article 324 the Election Commission can do so to ensure holding of free and fair election. The question whether free and fair election is possible to be held or not has to be objectively assessed by the Election Commission by taking into consideration all relevant aspects. Efforts should be to hold the election and not to defer holding of election.”

J.⁷⁰ The express constitutional provision of Art. 324(6) does not provide clarity on whether the assistance is limited to administrative assistance, or whether the same would cover assistance of armed forces as well. This aspect came up for consideration before the Constitution Bench under Serial No. 3 of the 2002 Presidential Reference⁷¹. The usage of the words “*requisite resources of the Union and the State*” would clearly be a matter under Art. 324(6) although the reference was in connection with conducting elections within six months under Art. 174⁷².

We must first analyse the majority opinion of three judges⁷³. The majority opinion lays out the general rule that the Commission should carry out elections without any possible delays, and in doing so all efforts should be made⁷⁴. But the exact nature of ‘efforts’ as stated here seems to be unclear⁷⁵. The majority opinion further states that in the ordinary course public order issues should not be a justification for postponement of elections⁷⁶. To avoid the delay on account of public order issues, all concerned parties must provide requisite assistance to the Commission⁷⁷. But the said finding⁷⁸ does not shed light on who the concerned parties are that are supposed to provide the requisite assistance. Does it cover the State Police? Does it cover paramilitary forces like ITBP and CRPF? Can this finding also permit the Commission to requisition the Country’s armed forces as and when it deems fit?

We now analyse the concurring opinion delivered by K.G. Balakrishnan, J. at paras 105 and 106 in this regard⁷⁹. It is opined that the Commission will have to carry out elections even in the aftermath of a natural disaster⁸⁰. To deal with this situation the Commission would be empowered to coordinate all actions with the help of different government departments⁸¹ (which in the present case may include NDRF i.e., National Disaster Response Force⁸²). But the finding also states that the Commission’s power to coordinate actions of government departments to carry out elections would also stand extended to the armed forces and the paramilitary forces⁸³. Further exposition is found in the succeeding paragraph where the Commission is now empowered to make use of all resources of the Union and State and command it to carry out elections⁸⁴. But this finding seems to be legally suspect. It is difficult to accept that the Commission will be entitled to take command of the armed forces simply on the stated objective of carrying out elections. Can the Commission even dictate the armed forces to use lethal force to conduct elections? It would be argued that this should not be permissible. While the Commission would be justified in delaying the conduct of elections on public order issues, it should not assume military command to exercise its purported functions. Let’s take a hypothetical situation of the Commission carrying out elections in a certain State, wherein the Commission feels some resistance from the local population in the form of protests. If the Commission is empowered to assume military command and order the armed forces to use lethal force against the citizens, then this could turn into an even bigger crisis. We can take another thought experiment to highlight the questionable consequences. Let’s say that the Commission doesn’t find a State’s police to be very compliant. Can the Commission be permitted to order the armed forces (and paramilitary forces) to use deadly force against the State’s police for the attainment of its purported objective of carrying out an election? It is argued that such an interpretation and the concomitant situation (that may arise) must be avoided.

We can take another thought experiment to highlight the problematic consequences of handing over military command to the Commission. Let’s suppose that there is a border skirmish or confrontation underway with a rival foreign power. In such a situation the Commission has authorized the military to use deadly force to smoothly carry out elections. But such use of deadly force could easily spiral out into a full-fledged war. The Election Commission does not have any knowledge or expertise in taking strategic military decisions (that could plunge the entire country into a war), and therefore the Commission should not be given the power of assuming military command. If the Election Commission can take tactical military action against rival countries, then what happens to the established chain of command? Will the established chain of command cease to exist in the periods of conducting the elections?

⁷⁰ Supra note 69.

⁷¹ Supra note 69 para 1.

⁷² Supra note 69 para 1.

⁷³ Supra note 69 para 84.

⁷⁴ Supra note 69 para 84.

⁷⁵ Supra note 69 para 84.

⁷⁶ Supra note 69 para 84.

⁷⁷ Supra note 69 para 84.

⁷⁸ Supra note 69 para 84.

⁷⁹ Supra note 69 para 105 and 106.

⁸⁰ Supra note 69 para 105.

⁸¹ Supra note 69 para 105.

⁸² The National Disaster Response Force has been statutorily created under the Disaster Management Act, 2005, No. 53, Act of Parliament, 2005 (India). It should be noted that the NDRF was formed in 2005, while the Presidential Reference was answered by the Constitution Bench in 2002.

⁸³ Supra note 69 para 105.

⁸⁴ Supra note 69 para 106.

We lastly come to analyzing the concurring opinion of Dr. Arijit Pasayat, J. at para 161 of the judgment⁸⁵. It is stated that cooperation of governments is not required for enforcing the constitutional mandate of Art. 174⁸⁶. But cooperation of governments will be provided to the Commission for effective exercise of its Art. 324 power to carry out free and fair elections⁸⁷. But the power to determine what constitutes a '*free and fair election*' has been left to the Commission⁸⁸. Although the opinion does not expressly authorise the use of armed forces (or paramilitary forces) for conducting elections⁸⁹, it seems to be implied as the Commission can determine the standards of a '*free and fair election*' and obtain cooperation of governments to enforce its standard of a '*free and fair election*'⁹⁰. Let's discuss a thought experiment to understand a problematic consequence. Let's say that the Commission is trying to carry out an election in a State marked with regional insurgency, due to which the conduct of elections has become unsafe. Can the Commission be granted the power to eliminate the insurgency and permit shoot at sight orders to the military? If this is allowed, then the Commission can theoretically take over the power of the Union Government to enforce the Armed Forces (Special Powers) Act⁹¹. It is therefore argued that the proposition of the Commission obtaining cooperation of the governments cannot tantamount to a situation of the Commission completely taking over the powers of the governments (including the powers under existing enactments). It should be noted that while the Tamil Nadu Case⁹² is referred to at para 160 of the judgment⁹³, no opinion has been expressed in the concurring opinion on whether the said decision still holds true for future instances⁹⁴.

From the above discussion it becomes clear that the scope of requisition of cooperation by the Commission under Art. 324(6) remains ambiguous till date. The first aspect is the determination test to be followed for ascertaining the requirement of assistance under Art. 324(6). The second aspect is whether the assistance/cooperation decided by the Commission is directory or mandatory. The third aspect is whether the assistance/cooperation contemplated under Art. 324(6) is restricted to government's civil authorities, or will it also cover military authorities as well. The fourth aspect is whether assistance/cooperation of military (or paramilitary) authorities can be deemed to mean the assumption of military command. The fifth aspect is whether assistance/cooperation of military (or paramilitary) authorities can extend to the Commission even authorizing the use of deadly force. The sixth aspect is whether the assistance/cooperation contemplated here from the governments can extend to cover instances of complete takeover of government departments (as desired by the Commission). It should be noted that the Presidential Reference answered by the Constitution Bench⁹⁵ has not been overruled by a Larger Bench till date.

V

THE 'POWER' TO AMEND THE ELECTION SYMBOLS ORDER, 1968

While it has been affirmed that the Commission is empowered under Art. 324(1) to issue the Election Symbols Order, the manner of amending it requires more analysis. The focus of the present discussion is on substitution of Form B of the 1968 Order⁹⁶. The Symbols Order has been amended 36 times till date, but 35 of such changes have involved the issuance of an official notification by the Commission⁹⁷. The substitution of Form B stands on a different footing, as this substitution was carried out by a Letter⁹⁸. It is this amendment in the form of substitution that seems legally suspect. The Symbols Order, 1968 has very wide ramifications on the Indian electoral process and change must necessarily be through an official government notification so as to bring it to the knowledge of all persons concerned (candidates standing for elections as well as the general public). This mechanism of amending the Symbols Order through a mere letter is legally suspect because the Commission's letters may be a part of internal circulation of which the affected parties would have no notice. The bigger argument at play here is that the legal framework of elections (herein the 1968 Order) should not be altered through internal communications instead of official government notifications. If the Commission is authorised

⁸⁵ Supra note 69 para 161.

⁸⁶ Supra note 69 para 161.

⁸⁷ Supra note 69 para 161.

⁸⁸ Supra note 69 para 161.

⁸⁹ Supra note 69 para 161.

⁹⁰ Supra note 69 para 161.

⁹¹ Armed Forces (Special Powers) Act, 1958 as amended up to Act 69 of 1986, No. 28, Act of Parliament, 1958 (India). Section 2 (b) read with section 3 indicates that only the Central Government/Administrator of a Union Territory/Governor would have the power to issue a notification to implement the Act in the specified region. The Election Commission has not been given any authorisation here in any capacity in the entire Act.

⁹² Supra note 66.

⁹³ Supra note 69 para 160.

⁹⁴ Supra note 69 paras 160 and 161.

⁹⁵ Supra note 69.

⁹⁶ Supra note 9 Form B.

⁹⁷ Supra note 9.

⁹⁸ Supra note 9 Form B. The said Form B was substituted vide the Commission's Letter No. 56/Symbol/2014/PPS-11, dated 14-10-2014.

to alter the legal framework for conduct of elections through letters, then it may give rise to allegations of bias of the Commission trying to favour a certain political candidate/outfit.

Let's take a thought experiment to understand the problematic effects. Let's assume that the Commission made changes to the Symbols Order without issuance of an official government notification. Such changes have imposed additional conditions of eligibility on persons who are standing for elections. One candidate who is not aware of such change has consequently failed to fulfil the new compliances. This candidate could then be held to be disqualified under Section 100 (iv) of the Representation of the People Act, 1951⁹⁹. This disqualification is tenable in light of the fact that non-compliance of ECI's directions are covered under the residual disqualification of Section 100 (iv)¹⁰⁰.

VI

IS THE COMMISSION EMPOWERED TO ACT AS A TRIBUNAL?

We first take up the Constitution Bench Ruling in Ponnuswami's Case¹⁰¹ to understand the principles for adjudication of election disputes in India. The first prominent principle stated is that if a certain right or liability is the creation of statute, then enforcement of such right or liability must take place under the specified statute itself¹⁰². Building on this principle, the Constitution Bench concluded that invalidation of an election result must be through an election petition before the Election Tribunal, after the election process stands completed¹⁰³. But it is the findings of the Constitution Bench at para 29 that deals with adjudication authorisation for election-related matters¹⁰⁴. The 2 relevant findings at para 29 are¹⁰⁵: - (i) Right of a person to vote or stand (as a candidate) in elections is not a civil right¹⁰⁶. Since it is a statutory creation (herein Representation of the People Act, 1951¹⁰⁷), it will mandatorily be subject to the statute that provides for it¹⁰⁸; and (ii) The legislature alone has the right to determine and examine all matters relating to members of such legislature¹⁰⁹. If the legislature has enacted a law to create a new jurisdiction in the Special Tribunal to decide such matters, then such Tribunal will exercise its powers in strict compliance with the authorising law¹¹⁰.

Now we analyse how the above findings have dealt with adjudicatory authorisation of the Commission, and whether the Commission is empowered to act as a Tribunal. Since the right to vote or stand in elections is a statutory creation, it will be subject to the limitations specified in that statute¹¹¹. This means that once it is established that a person's right to vote or stand in elections is being affected to any degree, then such interference will mandatorily have to be an express statutory curtailment. This would mean that the curtailment would have to be an express statutory provision of the main Act and not some subordinate legislation. The Election Symbols Order¹¹² is not a statute like the 1951 Act¹¹³, but is merely an Order of the Commission. The Symbols Order was originally issued under the authorisation of Art. 324. It was only in 1989

⁹⁹ Supra note 18 para 29.

¹⁰⁰ Supra note 18 para 29.

¹⁰¹ N.P. Ponnuswami v. Returning Officer, 1952 S.C.C. OnLine SC 3 at paras 19 and 29 [Constitution Bench – 6 Judges].

Relevant extract of para 19 of the judgment is quoted below: -

“19. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. ... That being so, I think it will be a fair inference from the provisions of the Representation of the People Act to state that the Act provides for only one remedy, that remedy being by an election petition to be presented after the election is over, and there is no remedy provided at any intermediate stage.”

Relevant extract of para 29 of the judgment is quoted below: -

“29. The points which emerge from this decision may be stated as follows:

(1) 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.

(2) Strictly speaking, it is the sole right of the legislature to examine and determine all matters relating to the election of its own members, and if the legislature takes it out of its own hands and vests in a Special Tribunal an entirely new and unknown jurisdiction, that special jurisdiction should be exercised in accordance with the law which creates it.”

¹⁰² Supra note 101 para 19.

¹⁰³ Supra note 101 para 19.

¹⁰⁴ Supra note 101 para 29.

¹⁰⁵ Supra note 101 para 29.

¹⁰⁶ Supra note 101 para 29.

¹⁰⁷ Supra note 27.

¹⁰⁸ Supra note 101 para 29.

¹⁰⁹ Supra note 101 para 29.

¹¹⁰ Supra note 101 para 29.

¹¹¹ Supra note 101 para 29.

¹¹² Supra note 9.

¹¹³ Supra note 27.

that an amendment further clarified that the said Order is also made under Section 29-A of the 1951 Act and Rules 5 & 10 of the 1961 Rules¹¹⁴. But it should be noted that the referred provisions of the 1951 Act¹¹⁵ and the 1961 Rules¹¹⁶ do not confer adjudication authorisation on the Commission to act as a Special Tribunal in any capacity. Section 29-A of the 1951 Act simply deals with the aspect that the Commission shall decide on the registration of a political party¹¹⁷. The said power under Section 29-A can be classified as only an executive power to decide on registration of a body as a political party, and no permission to adjudicate general disputes in connection with elections is found here¹¹⁸. Rule 5 only provides for the Commission to issue an official notification of the election symbols chosen by candidates¹¹⁹. Rule 5 further deals with preference to be accorded to selection of an election symbol in the first nomination paper submitted by a candidate¹²⁰. Rule 10 deals with preparation of a list of candidates standing for elections¹²¹. The decision-making power conferred under Rule 10 is that the Returning Officer can decide the allocation of an election symbol under sub-rule (4)¹²². The above decision of Returning Officer can be revised by the Commission under Rule 10(6)¹²³. It therefore becomes clear that neither Section 29-A of the 1951 Act nor Rules 5 & 10 of the 1961 Rules confer any adjudication authorisation to the Commission to generally determine any issues (on election related matters) in the capacity of a Special Tribunal. When we assess the second finding of para 29¹²⁴, it becomes clear that the Commission can act in the capacity of a Tribunal only if an express law of legislature grants such authorisation¹²⁵. The aforesaid discussion has already shown that the referred provisions of the 1951 Act and the 1961 Rules do not grant any authorisation to the Commission to act as a Tribunal for any subject matter whatsoever.

¹¹⁴ Substitution Amendment to the Election Symbols Order, 1968 by Notification No. O.N. 56 (E), dated 15-6-1989.

¹¹⁵ Supra note 27.

¹¹⁶ Conduct of Election Rules, 1961.

Relevant extract of rule 5 of the 1961 Rules is quoted below: -

"5. Symbols for elections in Parliamentary and Assembly constituencies.—(1) The Election Commission shall, by notification in the Gazette of India, and in the Official Gazette of each State, specify the symbols that may be chosen by candidates at elections in Parliamentary or Assembly constituencies and the restrictions to which their choice shall be subject.

(2) [Subject to any general or special direction issued by the Election Commission either under sub-rule (4) or sub-rule (5) of Rule 10, where at any such election], more nomination papers than one are delivered by or on behalf of a candidate, the declaration as to symbols made in the nomination paper first delivered, and no other declaration as to symbols, shall be taken into consideration under Rule 10 even if that nomination paper has been rejected."

Relevant extract of rule 10 of the 1961 Rules is quoted below: -

"10. Preparation of list of contesting candidates.—(1) The list of contesting candidates referred to in sub-section (1) of Section 38 shall be in Form 7-A or Form 7-B as may be appropriate and shall contain the particulars set out therein and shall be prepared in such language or languages as the Election Commission may direct.

(2) [Omitted]

(3) If the list is prepared in more languages than one, the names of candidates therein shall be arranged alphabetically according to the script of such one of those languages as the Election Commission may direct.

(4) At an election in a Parliamentary or Assembly constituency, where a poll becomes necessary, the returning officer shall consider the choice of symbols expressed by the contesting candidates in their nomination papers and shall, subject to any general or special direction issued in this behalf by the Election Commission,—

(a) allot a different symbol to each contesting candidate in conformity, as far as practicable, with his choice; and

(b) if more contesting candidates than one have indicated their preference for the same symbol decide by lot to which of such candidates the symbol will be allotted.

(5) The allotment by the returning officer of any symbol to a candidate shall be final except where it is inconsistent with any directions issued by the Election Commission in this behalf in which case the Election Commission may revise the allotment in such manner as it thinks fit.

(6) Every candidate or his election agent shall forthwith be informed of the symbol allotted to the candidate and be supplied with a specimen thereof by the returning officer."

¹¹⁷ Supra note 27 section 29-A.

¹¹⁸ Supra note 116 rule 5.

¹¹⁹ Supra note 116 rule 5.

¹²⁰ Supra note 116 rule 5.

¹²¹ Supra note 116 rule 10.

¹²² Supra note 116 rule 10.

¹²³ Supra note 116 rule 10.

¹²⁴ Supra note 101 para 29.

¹²⁵ Supra note 101 para 29.

There is also a constitutional bar that does not permit the Commission to act in the capacity of a Tribunal to decide on election disputes. This bar is arising out of Art. 323-B (1) read with Art. 323-B (2)(f) of the Constitution¹²⁶. Art. 323-B (1) authorises the appropriate Legislature to create Tribunals for determination of disputes concerning the subject matters specified in Art. 323-B (2)¹²⁷. Art. 323-B (2)(f) provides for subject matter of elections to the Parliament/State Legislature, but excludes matters falling under Arts. 329 & 329-A¹²⁸. Art. 323-B (4) is a non-obstante clause giving preference to Art. 323-B over any other provision of Constitution or any other law¹²⁹. The above provisions make it clear that Special jurisdiction of the High Court allows it to exclusively determine the matters of election disputes under Section 80-A of the 1951 Act¹³⁰ and the same can be inferred from the Constitution Bench Ruling¹³¹ (clarifying that elections must be challenged through an election petition under the 1951 Act and any other challenge is not maintainable under Arts. 226 & 339 of the Constitution¹³²). This would mean that if any election matter (involving the Parliament/State Legislature) falling outside the scope of the 1951 Act will have to be dealt with by the specially constituted Election Tribunal under Art. 323-B (2)(f). But the Commission has not been designated the status of such Special Election Tribunal under Art. 323-B (2)(f) under any Enactment of the Parliament/State Legislature till date. This would mean that till the Parliament/State Legislature actually makes an enactment for adjudication of election disputes through a Special Tribunal, the adjudicatory functioning of the Commission is unconstitutional. Though the Parliament retains authorisation to create Special Courts on matters specified in Art. 323-B¹³³, yet no specific adjudicatory authorisation under Art. 323-B (2)(f) has been granted to any Body/Authority till date.

At this stage it should be pointed out that the Tenth Schedule of the Constitution has conferred exclusive jurisdiction on deciding issues of disqualification (arising out of defection)¹³⁴. Since the Constitutional Provision has expressly authorized the Speaker to adjudicate on defined subject matter¹³⁵, it is a valid authorisation for creation of Special Election Tribunal under para 29(2) of Ponnuswami's Case¹³⁶.

Now we come to Sangma's Case¹³⁷ which is argued to be wrongly decided. The Court holds that though the issue at hand does not deal with para 15 of the Symbols Order, the Commission's decision to enquire into the dispute and adjudicate the same retains legal validity¹³⁸. The Court gives the finding that the Commission's general power to adjudicate disputes relating to elections is implied under Art. 324 and the 1961 Rules¹³⁹. Since the power to adjudicate such election disputes is implied, the Commission has the State's judicial power for this purpose¹⁴⁰. But the additional reasoning accorded by the Court for inferring such judicial power to the Commission seems questionable¹⁴¹. The said reasoning states that such implied judicial power is necessary to avert the situation of the parties (to an election dispute) approaching the regular courts¹⁴². The justification sought to be given is that the law has set up the special machinery (of Commission) to decide such election disputes with 'promptitude'¹⁴³, meaning thereby that regular courts would stand excluded from taking up such matters for adjudication¹⁴⁴. But this (claimed) objective of authorising the Commission to adjudicate all election disputes with great efficiency¹⁴⁵ does not find mention under any existing law.

At this stage it should be noted that when the law allows for the creation of a specialized Tribunal it also authorises the requisite aspects of clearly specifying the powers & jurisdiction of such Tribunal [like Art. 323-B (3)(b)¹⁴⁶], procedure to be followed [like Art. 323-B (3)(c)¹⁴⁷], exclusion of jurisdiction of other courts [like

¹²⁶ INDIA CONST. art. 323 B.

¹²⁷ Supra note 126.

¹²⁸ Supra note 126.

¹²⁹ Supra note 126.

¹³⁰ Supra note 27 section 80-A.

¹³¹ Supra note 101.

¹³² Supra note 101.

¹³³ L. Chandra Kumar v. Union of India, A.I.R. 1997 SC 1125 [Constitution Bench – 7 Judges].

¹³⁴ INDIA CONST. Tenth Schedule.

¹³⁵ INDIA CONST. Tenth Schedule. See Paragraph 6 wherein express authorisation to decide disqualification related disputes is evident.

¹³⁶ Supra note 101 para 29 (2).

¹³⁷ All Party Hill Leader's Conference v. M.A. Sangma, (1977) 4 S.C.C. 161 [Supreme Court – 3 Judges].

¹³⁸ Supra note 137 para 56.

¹³⁹ Supra note 137 para 37.

¹⁴⁰ Supra note 137 para 37.

¹⁴¹ Supra note 137 para 37.

¹⁴² Supra note 137 para 37.

¹⁴³ Supra note 137 para 37.

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¹⁴⁵ Supra note 137 para 37.

¹⁴⁶ INDIA CONST. art. 323 –B(3)(b).

¹⁴⁷ INDIA CONST. art. 323 –B(3)(c).

Art. 323-B (3)(d)¹⁴⁸], transfer of pending proceedings on the specified subject matter before another court to the specialized Tribunal [like Art. 323-B (3)(e)¹⁴⁹] and other ancillary provisions for the working of such Tribunal [like Art. 323-B (3)(f)¹⁵⁰]. It should be noted that none of these essential aspects dealing with conferment of judicial power of adjudication (for a Tribunal) find mention in the Three Judge Bench Ruling¹⁵¹. Another determination test for ascertaining the existence of a Tribunal under Art. 136(1) is to assess whether the body (herein the Commission) is required to adjudicate some dispute on a specified subject matter¹⁵². Even though the determination (by using judicial power) of an issue by the Commission does not have immediate bearing in the next election, the Commission still has judicial power to adjudicate such dispute¹⁵³. It should be noted that there is no authorising law of Parliament/State Legislature that requires the Commission to adjudicate any election dispute in the capacity of a Tribunal. This means that the aforesaid reasoning to justify the Commission's authority to act as a specialized Tribunal¹⁵⁴ is legally suspect. Even the prior discussion under this head of the Article shows that the Commission cannot be considered as a Tribunal with trappings of State's judicial power. Therefore, the final conclusion of holding the Commission to be Tribunal under Art. 136(1) is clearly unsustainable in law¹⁵⁵.

CONCLUSION:

THE GREY AREAS OF ECI'S FUNCTIONING AND ITS LESSONS FOR SDG 16

After extensive analysis of the relevant material, we conclude that ambiguous constitutional status exists qua the Election Commission of India in the following aspects: - (i) There is ambiguity in the constitutional standard for determining when the Commission is authorized to exercise its Article 324 constitutional power. The prior decision of Supreme Court's Three Judge Bench states that the Commission will exercise its power only when the existing law is silent on that subject matter relating to elections. The later decision of Supreme Court's Three Judge Bench states that the Commission will exercise its power only when a law does not expressly prescribe any duty for the Commission. But such difference cannot be reconciled until conclusive determination is made by a larger bench of the Apex Court. This can be illustrated through an example. Suppose there is a statute that deals with a certain subject matter of elections but no duty as such is expressly prescribed for the Commission. If the prior test is followed then the Commission has no jurisdiction to exercise its constitutional power, but if the later test is followed then the Commission attains the jurisdiction to exercise its constitutional power; (ii) The powers subsumed by the Commission under Paragraphs 15, 16 & 16-A of the Symbols Order, 1968 are argued to be ultra vires. The said Paragraphs authorise the Commission to intervene in matters of splits and amalgamation of political parties even when the issue of election symbols may not be involved. The Symbols Order should be confined in operation to election symbols alone and cannot be basis for conferring additional jurisdiction qua other elements in respect of the election process; (iii) The powers attained by the Commission under Paragraphs 15 & 16 of the Symbols Order, 1968 to adjudicate on issues relating to split and amalgamation of political parties are argued to be unconstitutional. This is based on the reasoning that the power to determine such issues have been conferred on the Speaker/Chairman of the relevant House of Legislature by the insertion of the Constitution's Tenth Schedule. The later Constitutional Amendment in the form of insertion of Tenth Schedule would tantamount to an implied repeal of any law to the contrary and this would include Paragraphs 15 & 16 of the Symbols Order, 1968; (iv) The requisite assistance that can be claimed by the Commission under Art. 324(6) for proper exercise of its powers remains ambiguous till date. The Supreme Court decisions do not clarify any ascertainable standard for determining what amounts to requisite assistance within this provision. The Supreme Court has seemingly left the issue open by stating that some mechanism may be created for deciding on the mutually acceptable assistance in the view of the Executive and Commission. There is also ambiguity on the question of whether such assistance would also extend to the Commission assuming command of the paramilitary and military forces of the country; (v) The last aspect for discussion is that a Supreme Court decision that confers adjudicatory authorisation of a Special Tribunal on the Commission is argued to be incorrect. The above contexts outline the governance gaps. Addressing the abovementioned gaps will definitely contribute in making administrative institutions transparent, inclusive and accountable and will facilitate the achievement of SDG 16 in India.

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¹⁴⁹ INDIA CONST. art. 323 –B(3)(e).

¹⁵⁰ INDIA CONST. art. 323 –B(3)(f).

¹⁵¹ Supra note 137.

¹⁵² Supra note 137 para 38.

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